TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1925

No. 935 748

HAROLD B. FISKE, PLAINTIFF IN ERROR,

vs.

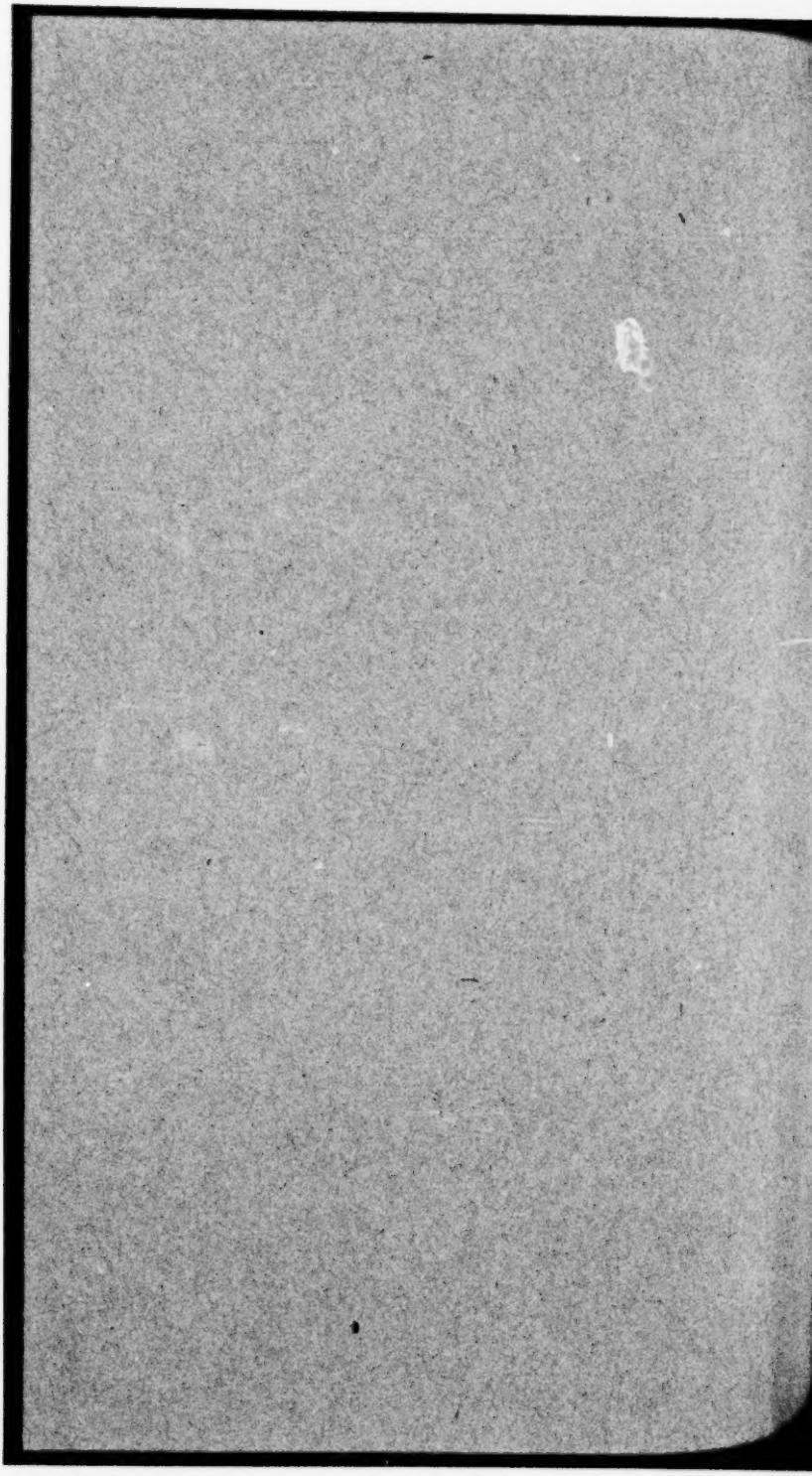
THE STATE OF KANSAS

IN ERROR TO THE SUPREME COURT OF THE STATE OF KANSAS

SD.

FILED MARCH 6, 1926

(30,929)



(30,929)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1925

No. 305

HAROLD B. FISKE, PLAINTIFF IN ERROR,

vs.

THE STATE OF KANSAS

IN ERROR TO THE SUPREME COURT OF THE STATE OF KANSAS

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., JULY 15, 1925

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[fol. 1] [Caption omitted]

[fol. 2] **IN DISTRICT COURT OF RICE COUNTY, KANSAS**

STATE OF KANSAS, Plaintiff

v.

HAROLD B. FISKE, Defendant

NOTICE OF APPEAL—Filed in Supreme Court Nov. 2, 1923

To the Hon. Bunn E. Tener, Clerk of the District Court of Rice County, State of Kansas, Greeting:

You are hereby notified that the defendant above named, Harold B Fiske, intends to and does hereby appeal from the verdict of the jury rendered against him in said cause on the 18th day of September, 1923, and from the judgment and sentence of the above named Court heretofore rendered against him on the 20th day of September, 1923, and does further appeal from said vedict as rendered by the jury and all orders and judgments and rulings of every kind and nature of said Court heretofore made and rendered in said cause. All of which you will take due notice.

(Signed) Chas. L. Carroll, Attorney for Defendant.

I, the undersigned, Bunn E. Tener, Clerk of the District Court of Rice County, State of Kansas, do hereby certify that I received a true copy of the above and foregoing notice on this 26th day of September, A. D. 1923.

(Signed) Bunn E. Tener, Clerk of District Court of Rice County, Kansas.

[fol. 3] [Title omitted]

NOTICE OF APPEAL—Filed in Supreme Court Nov. 2, 1923

To the plaintiff, The State of Kansas, and its attorney of record, L. E. Quinlan, County Attorney of Rice County, State of Kansas:

You are hereby notified that the defendant above named intends to and does hereby appeal from the vedict of the jury rendered against him in said cause on the 18th day of September, 1923, and from the judgment and sentence of the above named Court heretofore rendered aga-nst him on the 20th day of September, 1923, and does further appeal from said verdice as rendered by the jury and all orders and judgments and rulings of every kind and nature of said Court heretofore made and rendered in said cause. All of which you will take due notice.

(Signed) Chas. L. Carroll, Attorney for Defendant.

I, the undersigned, L. E. Quinlan, attorney for the above named plaintiff, the State of Kansas, doe hereby acknowledge service of a true copy of the above and foregoing notice of appeal this 29th of September, 1923.

(Signed) L. E. Quinlan, Attorney for Plaintiff.

STATE OF KANSAS,
Barton County, ss:

Chas. L. Carroll, being first duly sworn on oath deposes and says: That he is the attorney for the above named defendant, Harold B. Fiske, and that he served the original copy of the above and foregoing Notice of Appeal upon L. E. Quinlan, attorney of record for the above named plaintiff, and that the said L. E. Quinlan duly acknowledged the service of the same in writing and that the signature thereto is that of the said L. E. Quinlan.

—— ——.

Subscribed and sworn to before man on this — day of September, 1923. —— ——, Clerk of District Court of Rice County, State of Kansas.

———

[fol. 4] IN DISTRICT COURT OF RICE COUNTY

[Title omitted]

JOURNAL ENTRY OF VERDICT

Be it remembered that on this 18th day of September, 1923, the same being a regular judicial day of the September, 1923 term of said court and all of the officers thereof being present the above entitled matter came regularly on for hearing. The plaintiff appeared by L. E. Quinlan, County Atto-ney. The defendant appeared in his own proper person and by Charles Carroll, his attorney. Both parties having announced ready for trial the defendant waived arraignment and entered his plea of not guilty to the charge contained in the information.

Thereupon a jury of twelve good and lawful citizens of Lyons Rice County, Kansas was duly and legally empannelled and sworn to try the case. The Plaintiff introduced its testimony and rested its case. The defendant introduced his testimony and rested his case. Thereupon the jury were instructed by the court in writing as to the laws applicable to this case and after hearing the argument of counsel for the plaintiff and counsel for the defense the jury retired to a secluded spot in the custody of a sworn bailiff to consider its verdict. Thereafter and on the same day said jury returned into the court with a verdict, which verdict is in words and figures as follows:—

STATE OF KANSAS,
Rice County, ss:

THE STATE OF KANSAS, Plaintiff,

v.

HAROLD B. FISKE, Defendant

Verdict

We, the jury empanneiled and sworn in the above entitled case, do upon our oaths find defendant guilty as charged in the information.

(Signed George Mohney, (Foreman.)

[fol. 5] IN DISTRICT COURT OF RICE COUNTY

JUDGMENT AND SENTENCE—Filed in District Court Oct. 2, 1923; in Supreme Court Oct. 4, 1923

Thereafter and on the 20th day of September 1923 the defendant having filed a motion for new trial, said matter was again before the court to consider said motion and after considering said motion and hearing the arguments of counsel and being fully advised in the premises said motion is by the Court over-ruled and said verdict is approved. It is therefore ordered, adjudged and decreed that this defendant has been guilty of violation of the crime as charged in the information in this case.

Thereupon the defendant was asked if there was any lawful reason why the judgment of the Court should not be pronounced and none having been given, it is the judgment and sentence of this court that this defendant be taken from this place to the jail of Rice County, Kansas and at the earliest convenience of the sheriff of Rice County, he be transported and delivered to the warden of the State Penitentiary situated at Lansing, Leavenworth County, Kansas and that he be therein confined at hard labor for a period of not less than one (1) nor more than ten (10) years and until discharged according to law. To all of which defendant accepted and accepts.

(Signed) C. R. Douglass, Judge.

[fol. 6] IN DISTRICT COURT OF RICE COUNTY

[Title omitted]

CLERK'S CERTIFICATE

STATE OF KANSAS,
Rice County, ss:

I, Bunn E. Tener, Clerk of the District — of Rice County, Kansas do hereby certify that the above and foregoing is a true, full and

complete copy of the notice of appeal in the above entitled case as the same remains on file in my office.

In testimony whereof, witness my hand and the seal of said Court at my office at Lyons, Rice County, Kansas this the First Day of November, A. D. 1923.

(Signed) Bunn E. Tener, Clerk of the District Court of Rice County, Kansas. (Seal.)

[File endorsement omitted.]

SUPREME COURT

STATE OF KANSAS, ss:

I, D. A. Valentine, Clerk of the Supreme Court of the State of Kansas, do hereby certify that the above and foregoing is a full, true, and complete copy of the Notices of Appeal in the above entitled cause as the same remains of record in this court.

Witness my hand and the seal of the Supreme Court hereto affixed at my office in Topeka, this 26th day of January A. D. 1925.

—— ——, Clerk Supreme Court.

[fol. 7] IN DISTRICT COURT OF RICE COUNTY

[Title omitted]

CLERK'S CERTIFICATE

STATE OF KANSAS,
Rice County, ss:

I, Bunn E. Tener Clerk of the District Court of Rice County, Kansas do hereby certify that the above and foregoing is a true, full and complete copy of the Notice of Appeal and Journal Entry in the above entitled Case as the same Remains on file and of record in my office.

In testimony whereof, Witness my hand and the seal of said court at my office in Lyons, Rice County, Kansas, this the 2nd day of October, A. D. 1923.

(Signed) Bunn E. Tener, Clerk of the District Court of Rice County, Kansas. (Seal.)

[File endorsement omitted.]

SUPREME COURT

STATE OF KANSAS, ss:

I, D. A. Valentine, Clerk of the Supreme Court of the State of Kansas, do hereby certify that the above and foregoing is a full, true, and complete copy of the Notice of Appeal and Transcript in the above entitled cause as the same remains of record in this court.

Witness my hand and the seal of the Supreme Court hereto affixed at my office in Topeka, this 26th day of January A. D. 1925.

—— ——, Clerk Supreme Court.

[fol. 8] IN DISTRICT COURT OF RICE COUNTY

[Title omitted]

NOTICE OF APPEAL—Filed Oct. 27, 1923

To the plaintiff, The State of Kansas, and its attorney of record, L. E. Quinlan, County Attorney of Rice County, State of Kansas, Greeting:

You are hereby notified that the defendant above named intends to and does hereby appeal from the verdict of the jury rendered against him in said cause on the 18th day of September, 1923, and from the judgment and sentence of the above named court heretofore rendered against him on the 20th day of September, 1923, and does further appeal from said verdict as rendered by the jury and all orders and judgments and rulings of every kind and nature of said Court heretofore made and rendered in said cause. All of which you will take due notice.

(Signed) Chas. L. Carroll, Attorney for Defendant.

I, the undersigned, L. E. Quinlan, attorney for the above named plaintiff, the State of Kansas, do hereby acknowledge service of the above and foregoing notice of appeal on this 27th day of October, 1923.

(Signed) L. E. Quinlan, Attorney for Plaintiff.

STATE OF KANSAS,
Rice County, ss:

Chas. L. Carroll, being first duly sworn on his oath deposes and says: That he is the attorney for the above named defendant, Harold B. Fiske, and that he served the above and foregoing Notice of Appeal upon L. E. Quinlan, attorney of record for the above named plaintiff, and that the said L. E. Quinlan duly acknowledged service of the same in writing and that the signature thereto is that of the said L. E. Quinlan.

(Signed) Chas. L. Carroll.

Subscribed and sworn to before me on this 27th day of October, 1923. (Signed) Bunn E. Tener, Clerk of District Court of Rice County, State of Kansas.

[File endorsement omitted.]

[fol. 9-12] IN DISTRICT COURT OF RICE COUNTY

[Title omitted]

NOTICE OF APPEAL—Filed Oct. 27, 1923

To the Hon. Bunn E. Tener, Clerk of the District Court of Rice County, State of Kansas, Greeting:

You are hereby notified that the defendant above named intends to and does hereby appeal from the verdict of the jury rendered against him in said cause on the 18th day of September, 1923, and from the judgment and sentence of the above named Court heretofore rendered against him on the 20th day of September, 1923, and does further appeal from said verdict as rendered by the jury and all orders and judgments and rulings of every kind and nature of said Court heretofore made and rendered in said cause. All of which you will take due notice.

(Signed) Chas. L. Carroll, Attorney for Defendant.

I, the undersigned, Bunn E. Tener, Clerk of the District Court of Rice County, State of Kansas, do hereby certify that I received a true copy of the above and foregoing notice on the 27th day of October, 1923, and hereby acknowledged service thereof said day and date.

(Signed) Bunn E. Tener, Clerk of District Court of Rice County, State of Kansas.

STATE OF KANSAS,
Rice County, ss:

Chas. L. Carroll, being first duly sworn on his oath deposes and says: That he is the attorney for the above named defendant, Harold B. Fiske, and that he served the above and foregoing Notice of Appeal upon the said Hon. Bunn E. Tener, Clerk of the said District Court of Rice County, State of Kansas, on the said 27th day of October, 1923, and that the said Hon. Bunn E. Tener acknowledged service of the same in writing and that the signature thereto is that of the said Bunn E. Tener.

(Signed) Chas. L. Carroll.

Subscribed and sworn to before me on this 27th day of October, 1923. (Signed) Bunn E. Tener, Clerk of the District Court of Rice County, State of Kansas.

[File endorsement omitted.]

[1. . 13] IN SUPREME COURT OF KANSAS

No. 25333

THE STATE OF KANSAS, Appellee

vs.

HAROLD B. FISKE, Appellant

APPEAL FROM THE DISTRICT COURT OF RICE COUNTY, KANSAS, HONORABLE C. R. DOUGLAS, JUDGE

Abstract of the Record

Appellant was convicted of a violation of the anti-syndicalism act and appeals.

INFORMATION

On September 4th, 1923, information was filed against the defendant, which (omitting caption) is as follows:

"Comes now L. E. Quinlan, the undersigned, county attorney of Rice County, Kansas, and in the name of, by the authority of and on behalf of the State of Kansas, gives this court to understand and be informed that on or about the 2nd day of July, 1923, and in the County of Rice and State of Kansas, one Herold B. Fiske then and there being did then and there unlawfully, feloniously and wilfully, by word of mouth and by publicly displaying and circulating certain [fol. 14] books and pamphlets and written and printed matter, advocate, affirmatively suggest and teach the duty, necessity, propriety and expediency of crime, criminal syndicalism, and sabotage by then and there unlawfully, wilfully, knowingly and feloniously persuading, inducing and securing Henry Lang, Earl Summers and George Kelley to sign an application for membership in a society known as the Agriculture Workers Industrial Union No. 110 and by issuing to the said Henry Lang, Earl Summers and George Kelley membership cards, commonly known as the Red Card, in said Agriculture Workers Industrial Union No. 110, which said Agriculture Workers Industrial Union No. 110 is a branch of and component part of the Industrial Workers of the World organization, said defendant then and there knowing that said organization unlawfully teaches, advocates and affirmatively suggests:

"That the working class and the employing class have nothing in common, and that there can be no peace so long as hunger and want are found among millions of the working people and the few who make up the employing class, have all the good things of life." And that, "Between these two classes a struggle must go on until the workers of the World organize a class, take possession of the earth, and the machinery of production and abolish the wage system." And that: "Instead of the conservative motto, 'A fair day's wages for a fair

day's work' we must inscribe on our banner the revolutionary watchword, 'Abolition of the wage system.' "

"By organizing industrially we are forming the structure of the new society within the shell of the old."

All contrary to and in violation of Chapter 36 of the Laws of Kansas for the year 1920.

L. E. Quinlan.

[fol. 15] Sworn to by L. E. Quinlan. Jurat omitted in printing.

Motion for Continuance

On September 18th, 1923, defendant filed application for continuance, which was by the court overruled, which (omitting caption) is as follows:

"Comes now the defendant, Harold B. Fiske, by his attorney, Chas. L. Carroll, of Great Bend, Kansas, and moves the court to continue the above entitled case for the following reasons, to-wit:

That the regular counsel for the defendant, one Harold O. Mulks, of Chicago, Illinois, is unable to be present by reason of the fact that he is of counsel in cases now pending in another court; that the said Chas. L. Carroll has had no time in which to prepare a proper defense for the defendant herein; that unless said cause is continued until a later date, or until the next term of this court, that the defendant, Harold B. Fiske, will be prejudiced in his rights.

Chas. L. Carroll, Attorney for Defendant.

(Trans. 3.)

[fol. 16] Motion to Quash

On September 18th, 1923, defendant filed motion to quash, which was, by the court, overruled. This motion (omitting caption) is as follows:

"Comes now the defendant by his attorney, Chas. L. Carroll, of Great Bend, Kansas, and moves that the information be quashed and that it be dismissed as to the defendant as being insufficient for the following reasons, to-wit:

First. That it does not clearly set forth in plain and concise language without repetition the charges stated against the defendant; and

Second. That the information fails to specify the language used and the manner of advocating, affirmatively suggesting, teaching, persuading and inducing the persons, Henry Lang, Earl Summers and George Kelley, of signing applications for membership in said organizations as alleged therein; and

Third. That it fails to specify the character of the organization which it is alleged the defendant belongs to and for which he was securing members; and which he is alleged to have persuaded, induced and secured said persons as members thereof;

Fourth. That it is insufficient in that the nature of the unlawful acts advocated and suggested by the said defendant are not particularly stated; and

Fifth. That the offense is not stated with such a degree of certainty that the court may pronounce judgment upon conviction according to the right of the case; and

Sixth. That the defendant is not properly informed of the nature of the accusation against him as the constitution requires, and the [fol. 17] information does not contain a statement of the facts constituting the offense with the directness and certainty required by the code of criminal procedure.

Wherefore, and by reason of the above and foregoing, the defendant moves the court to quash the information in this cause and that it be dismissed as to him.

Chas. L. Carroll.

The above motion to quash information was by the court overruled."

(Trans. 4-5.)

TRIAL

On the 18th day of September, 1923, defendant was brought to trial upon the information as filed and the following proceedings were had:

ARGUMENT OF COUNSEL

The county attorney made the following opening statement:

"Mr. Quinlan: Gentlemen of the jury, the defendant in this case as stated to you before stands charged with (Mr. Quinlan here reads the information). Now, the testimony in this case will show that the defendant was in the City of Geneseo, Rice County, Kansas, on or about the 2nd day of July, 1923; that he there had in his possession a large number of what is commonly called the red cards of the Industrial Workers of the World organization; that he was an authorized delegate of the Industrial Workers of the World organization to secure application and memberships in the Agriculture Workers of the World Industrial Union No. 110, and that this is a [fol. 18] branch of and part of the I. W. W. organization, and that at that time and place he did secure these three persons named in this information to sign application cards and took money from them, and showed to each of them a red card, and this red card contains a certificate that the person has become a member of the

organization, and is entitled to all the rights and benefits of the organization so long as he pays his dues, also sets out the preamble of the constitution of the Industrial Workers of the World. The facts stated in that preamble the state contends constitutes—is unlawful. The testimony will further show that he had on his person other literature and reports which are supposed to be sent in each week to the head of the organization in Chicago, and that when he was arrested in the City of Geneseo he had this stuff on his person, and that he stated to the sheriff and to the city marshal of Geneseo and to other persons that he was an I. W. W. organizer and that he had secured these memberships in the organization, and I think his testimony will show that he came out from Oklahoma for the specific purpose of doing this work. Now, the testimony will further show that he knew that all of the facts that I have stated by reason of the fact that he had been a member of this organization for several years and knew of its workings and its teachings, and when we have proved these facts we are going to ask you gentlemen to return a verdict of guilty of the offense charged in this information" (Trans. 6-7).

CHARLES WARD, a witness for the plaintiff, testified as follows:

I am sheriff of Rice County, Kansas and was sheriff during the month of July, 1923. I first saw the defendant in the jail at [fol. 19] Geneseo. I was called there. I went in the cell in the jail and got him out of bed and searched him. I found a bunch of literature on him (Trans. 9). Jim Altland and several others from Geneseo were present. I had a conversation with the defendant. In looking over the different articles we had taken from him, I noticed some applications for membership, asked him if they belonged to him and he said they did, and asked him if he was an organizer for the Industrial Workers of the World and asked him if he belonged to the I. W. W. and he said that he did, and he said he came from Oklahoma, and I believe that he got fifty cents apiece from taking memberships and I asked him if he had taken any there that day and he said he had taken two and I noticed a membership of three. He said he had taken two there in Geneseo since he had been there. I also asked him about a discharge he had from the army about the condition he was in and insurance. I brought the articles to Lyons and looked them over down at the jail and turned them over to the county attorney (Trans. 10). Plaintiff's Exhibits 6, 7 and 8 were in the package of stuff we got from Fiske. These were the exhibits I found when I asked him about taking memberships. Plaintiff's Exhibit 12 also came from the papers and things we got off of Fiske. I don't remember that I had any conversation with him about these exhibits, but I have heard him sing this song since he has been in jail. I do not know what tune he sang it to (Trans. 11). Plaintiff's Exhibits 11, 3, 22, 21, 17, 1, 5, 15, 26, 18, 19, 29, 28, 14, 16, 10, 20, 24, 2, 25 and 23 were all in the articles that were

taken from the defendant and turned over to the county attorney (Trans. 12-13).

[fol. 20] Q. You may state whether or not the literature and exhibits identified are membership cards and application blanks and general industrial unions—general defense stamps—and by-laws and rules and the constitution, application for memberships of the Industrial Workers of the World organization?

Mr. Carroll: Your Honor, we object to that question for the reason there has not been any proper foundation laid to show that the witness has knowledge of what the I. W. W. organization publishes or whether they published any of these supposed papers.

The Court: I don't recall just what the first qualifying questions were.

Mr. Quinlan: I asked him if he knew and he said he did.

The Court: I think the witness showed himself qualified to answer. The objection will be overruled. You may test his knowledge on cross examination.

A. They are the same as other organizers that I have been around have had and the same as those who have been in jail had.

Mr. Carroll: I move to strike that answer out as not being responsive to the question.

The Court: I don't think that is hardly responsive. It may be in a way. It is not hardly responsive to the question. Read his original question, will you?

(Reporter read the question.)

The Court: What kind of organizers did he say?

A. Just said organizers. Supposed to have been I. W. W. organizers.

Mr. Carroll: Move to strike that out. He just said supposed to be.

[fol. 21] The Court: Oh, I think I will leave it in as we can prove those by circumstances as well as direct testimony.

Mr. Quinlan: What was the ruling?

The Court: I will leave it in. I say we can prove those by circumstances as well as direct testimony (Trans. 13-14).

Afterwards, defendant stated that those red cards were like all Industrial Workers carried.

Mr. Quinlan: Your Honor, we offer in evidence all of these exhibits—all of the exhibits as noted by the reporter.

Mr. Carroll: Your Honor, we object to the introduction of any of this evidence for the reason that no independent evidence has been introduced here showing that these are the publications of the organization known as the International Workers of the World. They might have been published down here in the Lyons printing house or the Great Bend printing house or some other printing establishment for all we know, and there is nothing here shown that these are the books or booklets or papers of that organization.

Mr. Quinlan: I think, Your Honor, it would be immaterial as to where they are published. It is the use to which they are put that counts in this case.

Mr. Carroll: If you can show a connection between this defendant and the organization.

The Court: Well, the state cannot be supposed to introduce all of its evidence at one time. Overruled. Consider them in (Trans. 14-15).

PLAINTIFF'S EXHIBIT "6"

Appl. No. —.
Form 5.

[fol. 22] Application for Membership

Do you agree to abide by the constitution and regulations of this organization? Yes. Will you study its principles and make yourself acquainted with its purposes? Yes. Name, George Kelley. Occupation, laborer. Industry, farming. Address: —— Street. City: ——. State: ——. Date: July 1/23. I. U. No. 110. Card No. 121877. Initiation: 2.00. Dues, .50. Asst's, —. Total, —. Del. Name, Harold B. Fiske. No. A. G. 911.

Notice to Delegate

Attach this Application Blank to your Report Sheet when making your report.

(Trans. 15)

STATEMENT RE EXHIBITS

Plaintiff's Exhibit "7"

(Plaintiff's Exhibit 7 is exactly the same as plaintiff's Exhibit 6, except that the name is "Earl Summers" and the card number and amounts paid are different.)

Plaintiff's Exhibit "8"

(Plaintiff's Exhibit 8 is exactly the same as plaintiff's Exhibit "6," except that the name is "Henry Lang" and the amounts paid and card number are different.)

Plaintiff's Exhibit "12"

(Plaintiff's Exhibit 12 is a poem or song relating to "Everett's Raid"; there is no evidence in the record showing that this song had any connection, whatever, with defendant's activities as an organizer for the I. W. W., or that it was part of the literature of the I. W. W., [fol. 23] and for this reason it is not abstracted.)

Plaintiff's Exhibit "11"

Plaintiff's Exhibit 11 is a blank report of receipts and expenses to be made by organizers of the I. W. W.

Plaintiff's Exhibit "3"

Plaintiff's Exhibit "3" is a statement of receipts and expenses of "Harold B. Fiske, 807153 A. G. 901."

Plaintiff's Exhibit "22"

By-laws and rules of order used in business meetings of the Agricultural Workers' Industrial Union No. 110 of the I. W. W., 1001 West Madison Street, Chicago, Ill.

(This exhibit connects with the preamble of the I. W. W., which is set out at a later point in this abstract.) (Trans. 20-21.)

Following the preamble, are the by-laws of the A. W. I. U. No. 110, which concerns election and terms of officers, and general administrative conduct of the organization (Trans. 22-27).

Then follow "Resolutions," which are as follows:

"1. Resolved that A. W. I. U. No. 110 go on record in favor of authorizing permanently located members of the I. W. W. to act as voluntary stationary delegates with power to issue credentials and supplies to job delegates, and that they work under the supervision of, and report regularly to the main office of the A. W. I. U. No. 110.

[fol. 24] 2. Resolved, that all members who have proven to have raised their hours be considered guilty of scabbing and that they be expelled.

3. Resolved, that we cut out working by the hour, and work by the day, and that we take action to compel threshermen to maintain full crews. (Last year many rigs were short handed, which deprived men of the little rest which they were entitled to at the machine by being forced to do extra work at the same wages and at the same time robbing the unemployed of a chance to work).

4. Resolved, that no members in the harvest field call a strike in any locality or on any threshing machine unless they are working and drawing pay from the said machine.

5. Resolved, that the A. W. I. U. No. 110 go on record not to recognize any members unless they have their card with them at all times.

(Trans. 27.)

Then follow "Instructions to Branch Secretaries," which are entirely administrative in character.

Then follow the following:

"Support Your Job Delegate

"Any member, who is carrying credentials and supplies, and is trying to educate and organize the workers, is surely worthy of the support of all members on the job. He is doing this with no idea of

bettering his immediate conditions, but realizes that only through organization can the conditions of the workers be bettered.

You, no doubt, believe this. Therefore, we ask that you do not [fol. 25] throw the brunt of the battle on the job delegate. If there are non-members on the job it is your duty to try to organize them. It is your duty to distribute literature among the unorganized workers. If you believe in this organization, you will never miss an opportunity to advance the idea of industrial unionism" (Trans. 30).

Then follow a list of industrial unions and their departments (Trans. 30-33).

Then follow certain instructions as to parliamentary procedure in meetings (Trans. 33-37).

Except what may be contained in the portion quoted above, there is nothing in this exhibit relating to the purposes of the organization.

Plaintiff's Exhibit "21"

This exhibit consists of a blank membership card in the Industrial Workers of the World, upon which is printed the preamble to the constitution, which is set out at a later point in this abstract. Except for this preamble, there is nothing in this exhibit relating to the purposes of the organization (Trans. 37-40).

Plaintiff's Exhibit "17"

This exhibit is in all respects the same as plaintiff's Exhibit "21," with the exception of the number (Trans. 40).

Plaintiff's Exhibit "1"

This exhibit is an official membership book in the Industrial Workers of the World organization, issued to Harold B. Fiske, the defendant. It contains the preamble, which is set out at a later point in this abstract, then contains the following information about Fiske:

[fol. 26] Name: Harold B. Fiske. ——. A. 2525. Initiated by Industrial Union No. 110, Branch No. —, Oct. 2, 1921. Agricultural. Department: Farming. Industry: Laborer. Occupation. Gen. No. 807,153. John Grady, Gen. Sec'y Treas.

(Trans. 42)

The remainder of the exhibit consists of a record of transfers, dues and special assessments paid (Trans. 43-46).

Plaintiff's Exhibit "5"

Plaintiff's Exhibit "5" consists of the preamble and constitution of the Industrial Workers of the World. Following an index, (Trans. 47-49) is the preamble, which is as follows:

"The working class and the employing class have nothing in common. There can be no peace so long as hunger and want are found among millions of the working people and the few, who make up the employing class, have all the good things of life. [fol. 27] Between these two classes a struggle must go on until the workers of the world organize as a class, take possession of the earth and the machinery of production, and abolish the wage system.

We find that the centering of the management of industries into fewer and fewer hands makes the trade unions unable to cope with the ever growing power of the employing class. The trade unions foster a state of affairs which allows one set of workers to be pitted against another set of workers in the same industry, thereby helping defeat one another in wage wars. Moreover, the trade unions aid the employing class to mislead the workers into the belief that the working class have interests in common with their employers.

These conditions can be changed and the interest of the working class upheld by an organization formed in such a way that all its members in any one industry, or in all industries, if necessary, cease work whenever a strike or lockout is on in any department thereof, thus making an injury to one an injury to all.

Instead of the conservative motto, 'A fair day's wage for a fair day's work,' we must inscribe on our banner the revolutionary watchword, 'Abolition of the wage system.'

It is the historic mission of the working class to do away with capitalism. The army of production must be organized not only for the everyday struggle with capitalists, but also to carry on production when capitalism shall have been overthrown. By organizing industrially we are forming the structure of the new society within the shell of the old" (Trans. 49-50).

[fol. 28] Following the preamble, is the constitution (Trans. 51-79), which is entirely administrative in scope and contains nothing relating to the purposes of the organization, except the following:

"Resolutions

Political Parties and Discipline

Whereas, the primary object of the Industrial Workers of the World is to unite the workers on the industrial battlefield; and

Whereas, organization in any sense implies discipline through the subordination of parts to the whole and of individual member to the body of which he is a part; therefore, be it

Resolved, that to the end of promoting industrial unity and of securing necessary discipline within the organization, the I. W. W. refuses all alliances, direct and indirect, with existing political parties or anti-political sects, and disclaims responsibility for any individual opinion or act which may be in variance with the purposes herein expressed.

Agreements

Any agreement entered into between the members of any union or organization and their employers, as a final settlement of any difficulty or trouble which may occur between them, shall not be considered valid or binding until the same shall have the approval of the General Executive Board of the Industrial Workers of the World.

No union of the general organization, Industrial Department or Industrial Union of the I. W. W., shall enter into any contract with an individual or corporation of employers binding the members to any of the following conditions:

[fol. 29] (a) Any agreement wherein any specified length of time is mentioned for the continuance of the said agreement.

(b) Any agreement wherein the membership is bound to give notice before making demands affecting hours, wages or shop conditions.

(c) Any agreement wherein it is specified that the members shall work only for employers who belong to an association of the employers.

(d) Any agreement that proposes to regulate the selling price of the product they are employed in making.

(e) No Industrial Union, or any part of the Industrial Workers of the World shall enter into agreement with any labor organization contrary to the principles of the Industrial Workers of the World" (Trans. 78-79).

Following the constitution is an appendix, containing Rules of Order, List of Industrial Unions, Instructions in use of Universal Credentials, How to make out application for membership, How to fill out members' due book, How to place dues stamps in members' book, How to make out Report, How to make out Notice of Transfer, How to make Application for Duplicate Cards, How to make out Supply Bill, and Order of Business (Trans. 80-93). None of which contains anything concerning the purposes of the organization.

Plaintiff's Exhibit "15"

Plaintiff's Exhibit "15" consists of "Report of Amount Collected and of Whom A. G. 901," and shows collections from four persons, including Henry Lang on June 30th, of $2.00 initiation fee, $1.50 dues, $1.00 assessments, initiated by Union 110 on June 30th, 1923. [fol. 30] The other names on this exhibit are not the names of any persons defendant is charged with having solicited and no where on the exhibit appears the town or state in which Henry Lang was initiated.

Plaintiff's Exhibit "26"

This exhibit is identically the same as Plaintiff's Exhibit "22."

Plaintiff's Exhibit "18"

This exhibit consists of a book of stamps for monthly dues Industrial Workers of the World, of 50c each.

Plaintiff's Exhibit "19"

This exhibit consists of a book of stamps of $1.00 denomination, entitled "Bail Bond, Obligation 1923."

Plaintiff's Exhibit "29"

This exhibit is as follows:
"Date: July 1/23. Initiation fee: 2.00. Dues: 1.50. B. & B.: 1.00.
Del. No. AG 901.
Name: Henry Lang. Card No. X121875.
Date: July 1/23. Initiation fee: 2.00. Dues: .50. Del No. AG 901.
Name: George Kelley. Card No. X121877.
Date: July 1/23. Initiation fee: 2.00. Dues: .50. Del No. AG 901.
Name: Earl Summers. Card No. X121874." (Trans. 95).
The remainder of this exhibit consists of blank "Application for Membership."

[fol. 31] Plaintiff's Exhibit "28"

This exhibit consists of a blank statement of transfer from one Union to another (Trans. 96).

Plaintiff's Exhibit "14"

Plaintiff's Exhibit "14" is a statement from the Secretary-Treasurer of Lumber Workers Industrial Union 120, I. W. W., that the accounts of Harold B. Fiske have been settled in full (Trans. 96).

Plaintiff's Exhibit "16"

This exhibit is a similar certificate from the Agriculture Workers Industrial Union No. 110.

Plaintiff's Exhibit "10"

This exhibit is a book of "Defense Stamps," denomination 50c each, 1923.

Plaintiff's Exhibit "20"

This exhibit is a book of "General" stamps, denomination 50c each.

Plaintiff's Exhibit "2"

This exhibit is as follows:

"To whom it may concern:

The Bearer Fellow Worker, Name Harold B. Fiske, AG 901, Card No. 807153, Del. No. AG 901, has been duly appointed as Delegate for all Industrial Unions of the I. W. W., and is authorized to collect dues and initiate new members. Dues 50c per month. The initiation fee is $2.00.

[fol. 32] Date- this April 20th, *day of 20th* 1923.

Harold B. Fiske (Signature of Delegate)."

(Trans. 97-98.)

Upon this exhibit is printed the preamble heretofore set out in this abstract, and also some administrative instructions to delegates (Trans. 98-104).

Cross-examination of Charles Ward:

I first met the defendant about the first of July of this year. The first thing I said to him I told him to get up out of bed, that I wanted to search him and look him over and wanted to take him to jail at Lyons. I did not have a search and seizure warrant when I searched him. I asked him if he had got any members there, he said he got two, he did not say what their names were, I didn't ask him. I don't know of my own knowledge, or other than his statement, whether he had tried to secure any members or had obtained any members in that community. I do not know Henry Lang, Earl Summers or George Kelley and do not know where they live or where they are now, nor have I at any time known where they reside (Trans. 105-106).

Redirect examination:

The City of Geneseo is in Rice County, Kansas.

Recross-examination:

I do not know whether Henry Lang, Earl Summers and George Kelley were ever present in Rice County, Kansas (Trans. 106-107).

[fol. 33] W. F. Alexander, a witness for plaintiff, testified as follows:

I live at Geneseo and am engaged in the garage business, was present in Geneseo about the 2nd of July, when the sheriff came to Geneseo to arrest the defendant. I heard the defendant and the sheriff have a conversation at that time. The sheriff went into the cell and told the defendant to get up that he wanted to go through him, wanted to search him; he did, and asked him if he was a mem-

ber of the I. W. W.'s, and he said yes; asked him if was an organizer and he said yes, he asked him if he got any members there and he said yes, he said two (Trans. 107). I saw some literature and pamphlets that had been taken off of him, but did not see them take them off him. Nothing was said about application blanks, that I remember of.

Cross-examination:

There were several of us around when the sheriff was over at the city jail, I was not a prisoner there and did not have any duty there, came more through curiosity than anything else. I think I was there about twenty minutes (Trans. 108). I think I heard all the conversation that took place between the sheriff and the defendant. I could not say that he said Geneseo, but he said "there." The sheriff said, "Have you got any members here in this county?" And he said, "Yes, two." I do not know Henry Lang, Earl Summers of George Kelley, have never known them, never saw the defendant but once before (Trans. 109), that was that morning in jail (Trans. 110).

[fol. 34] JIM ALTLAND, a witness for plaintiff, testified as follows:

I am city marshal of the City of Geneseo and was on or about the 2nd day of June, 1923. I first saw defendant at that time, east of the Missouri Pacific Depot, and I searched him and arrested him; I just asked him if he was an organizer and he said he wasn't, then I searched him and found literature. I took the literature up to the justice of the peace's office and kept it there until Mr. Ward came and then returned it to Mr. Ward (Trans. 111). We did not have much conversation with him until the sheriff came. The sheriff told him to get up and he was going to search him. He asked him did he get any members there and he said he got two. He had the cards in his hands and he said "Did you get all these here?" and he said "No," he just got two here. That was about all there was to it. I do not know when the defendant came to Geneseo. The first I knew of him he was standing at the high platform at the depot. At that time there were a great many harvest hands around there. I know everybody in Geneseo and it is among my duties to go upon the tracks and see whether or not there are any strangers there (Trans. 112).

Cross-examination:

I did not have a warrant for defendant's arrest. I did not need it. I arrested him and took him down to the jail and searched him. I took the papers off of him without any official process or warrant. I don't remember the hour of the day he was arrested, nor the day of the month, but my memory is very clear as to what was said at that time. I knew I was going to be called as a witness in this case, the [fol. 35] county attorney called me over the phone. I do not know

of my own personal knowledge whether the defendant had solicited members for any organization in or about the City of Geneseo.

Mr. Quinlan: Your Honor, I just wanted to read some of these exhibits to the jury.

Mr. Carroll: Your Honor, I wish to renew the objection I made a while ago and also to make the objection for the further reason that the evidence obtained in this case was obtained unlawfully by search and seizure without any legal process whatever, contrary to the Constitution of the United States and the State of Kansas, and for the further reason that no independent evidence has been introduced here by the state to show that any of this property is the property of the organization known as the International Workers of the World or the Agricultural Workers Industrial Union No. 110, which is alleged to be a component part of that organization. This evidence was obtained off of this person before ever any warrant was ever issued for his arrest or any legal process for his arrest was made.

Mr. Quinlan: If this was secured from the defendant illegally, he knows the way to get it back and he has not exercised his rights.

The Court: I don't know as it makes any difference how he obtained the evidence, whether they rightfully got it or just took it away. There is only one feature there that I am not quite clear about —that is the allegation in your information that he was soliciting members—that is, not for the Industrial Union, but for this certain farm organization.

Mr. Quinlan: The exhibits will show that. That is the reason we want it in evidence.

[fol. 36] The Court: I have already ruled they will be in.

Mr. Quinlan: Now, I will first read the Plaintiff's Exhibit No. 2. (Reads Plaintiff's Exhibit No. 2 to the jury.)

Mr. Quinlan: The Plaintiff's Exhibit No. 6. (Reads Plaintiff's Exhibit No. 6 to the jury.)

Mr. Quinlan: Plaintiff's Exhibit No. 7 is the same as Exhibit 6, except the name of Earl Summers. Plaintiff's Exhibit No. 8 is the same as No. 7, with the exception of the name of Henry Lang.

Mr. Quinlan: Plaintiff's Exhibit No. 22. After the preamble, which is the same as I read before, comes the by-laws. (Reads Plaintiff's Exhibit No. 22 to the jury.) (Trans. 115-116-117.)

The county attorney then read the remainder of the exhibits to the jury.

CHARLES WARD recalled:

I know that this literature was published or caused to be published by the Industrial Worker of the World, because we have taken fellows up that belonged to the Industrial Workers of the World and they had those cards and said they were the cards of the Industrial Workers of the World. That is the only way I know about their literature (Trans. 119-120).

Thereupon, the plaintiff rested.

"Mr. Carrol: Your Honor, I would like to have judgment in this matter for the reason that the state has not shown here that the defendant is guilty of any crime whatsoever, and that the state has failed to produce a case against the defendant.

[fol. 37] The Court: Well, just wait a minute before you go into that, gentlemen. I want to hear from both sides on this proposition, and gentlemen of the jury, I am going to excuse you until further call, and you can quietly pass out and remain in the corridor somewhere, but don't remain in the hearing of the court room while the argument is going on, and during the time you are out don't permit any persons to talk to you about this case or talk in your presence about the case or form any opinion about this case yourselves, or express any opinion in regard to the merits of this case while you are out of the court room. You can just pass out of the court room now.

(Jury retires from the court room.)

Thereupon, the defendant demurred to the evidence of the state, and the court, after argument of counsel, overruled the said demurrer" (Trans. 120-121).

HAROLD B. FISKE, a witness for the defendant, testified:

"My home is at Clinton, Washington. I am twenty six years old and have been a seaman up until two years ago. Since that time, I have [illegible] that came along. I worked in the harvest fields last summer and in the woods in Washington last winter, and in the harvest fields in Oklahoma this year (Trans. 122). I was in Oklahoma from June 12th until the 30th. I was in Enid and in Alva. I harvested two weeks out at Alva and then started for Kansas with the harvest, following it up.

Q. When did you come to this county?

A. Well, I don't know just where the boundaries are but——

[fol. 38] Q. (Interrupting.) I mean you arrived at Genesco, did you?

A. I arrived at Genesco on the night of June 30th.

Q. On the night of June 30th?

A. Yes, about eight o'clock.

Q. What day was that of the week?

A. That was Saturday.

Q. That was a Saturday you arrived that night, did you?

A. Yes, about eight o'clock.

Q. Did you stop at any place in the State of Kansas other than that before you arrived at Genesco?

A. Yes; I stopped at Haven.

Q. In Haven, Kansas?

A. Yes.

Q. Do you know what county that is in?

A. No; I don't" (Trans. 123).

I was in Haven about a day and a half. While I was there, I had conversation with quite a few persons. I met a Mr. Henry Lang , Mr. Earl Summers and a Mr. George Kelley there. I never saw those parties at or near Geneseo any time during the year 1923, or within two years prior to July 2nd. I met them right by the depot in Haven. I had a conversation with Mr. Ward at the jail at Geneseo, but did not tell him that I had taken any applications for membership there. He asked me if I had taken memberships for the I. W. W. and I said yes (Trans. 124). I have never taken any memberships for the I. W. W. in Rice County, Kansas, nor distributed any literature of the I. W. W. there, nor for the organization known as the Industrial Workers of the World. I have been [fol. 39] a member of the Industrial Workers of the World since October 2nd, 1921, and know what that organization teaches. I did not at any time by word or mouth make a statement advocating or affirmatively suggesting and teaching the duty, necessity, propriety and expediency of crime, nor of criminal syndicalism, nor of sabotage, and do not know that the organization of the Industrial Workers of the World unlawfully teaches, advocates and affirmatively suggests and teaches the duty, necessity, propriety and expediency of crime, nor of criminal syndicalism, nor of sabotage (Trans. 125-126). I am a single man, with my home in Clinton, Washington. My mother lives there. I have never been arrested or confined in jail, except on minor charges. I was arrested this spring in Goodman, Missouri, for being an I. W. W., but I was released by paying $2.00 costs. I was arrested in Enid, Oklahoma, and was held seven days and released without trial. There was a charge of vagrancy, but they dismissed it. There were never any charges filed against me, of a criminal nature (Trans 126). I have never at any time solicited any applications for membership in the society known as the Agricultural Workers Industrial Union Number 110 in Rice County, Kansas.

Cross-examination:

I was in Alva, Oklahoma, about two weeks. The Agricultural Industrial Workers Union No. 110 is a branch of the I. W. W. I was a delegate and solicitor in June, 1923 (Trans. 127). Plaintiff's Exhibit No. "25" is the official membership card of the Industrial Workers of the World. I secured the application of Henry Lang at Haven, Kansas. He paid $2.00 initiation fee, $1.50 dues and [fol. 40] $1.00 assessment, and I issued him one of the official membership books. I did the same thing with Earl Summers and George Kelley. Whenever I had an application for membership, I issued them a membership card. I was in Rice County, Kansas, on the 1st day of July, 1923 (Trans. 128). I came in on the evening of June 30th. The application of George Kelley was dated July 1st, 1923, and so was the application of Earl Summers and Henry Lang. I understand what the Industrial Workers of the World organization teaches. I understand that it teaches, advocates and states that the working class and the employing class have noth-

ing in common and that there can be no peace so long as a few, who make up the employing class, have all of the good things of life. I understand that between these two classes a struggle must go on until the workers of the world organize as a class, take possession of the earth and the machinery of production, and abolish the wage system. I understand that instead of the conservative motto "A fair day's wages for a fair day's work" we must inscribe on our banner the revolutionary watchword "abolition of the wage system" (Trans. 129). I understand that by organizing industrially we are forming the structure of the new society within the shell of the old. We are organizing with industrial unions to take care of the labor situation in this country and in the world. That means that there won't be any capital, and that means that everybody—that one will be just as well off as the other fellow; at such time as it can be done; and means that everybody will work. That is what it means when it says "By organizing industrially we are forming the structure of the new society within the shell of the old." The new society will be a new organization—new control—control [fol. 41] of industry. By "in the shell of the old," I mean it will be forward, and instead of breaking up, we will not destroy anything, but we will build them (Trans. 130). We will not take over the property, but everybody will own property. This will be forced in economically. That is what I was teaching and suggesting when I took these applications. I didn't come right out and say that (Trans. 131). The working class will enforce the laws when they are organized sufficiently. The people of the earth will make the laws; we will all belong to the working class.

I worked about a month and a half this year in the State of Washington (Trans. 133). I worked at Sand Point, Idaho, for about two months, cutting cord wood. From there, I went to Missouri and worked at picking strawberries about fourteen days (Trans. 134). I took these applications for membership, which contain a preamble of the constitution, in Haven, Kansas. I don't know what county it was in. It was on Saturday, June 30th, 1923. I don't remember just what I did tell them. They came to me and asked me if I knew where there was an I. W. W. organizer, and I told them I was one and they asked me to explain it to them and I explained it to them. I explained the principles of the organization as far as I knew (Trans. 136). They read the preamble. I explained it to them by letting them read the preamble. I told them that the Agricultural Industrial Union was a part of the I. W. W. organization. I just showed them the preamble (Trans. 137).

Plaintiff's Exhibit No. "12" is a song (Trans. 138). It was written in 1916 in Everett, Washington, by a member of the International Shingle Weavers' Union. They are not a branch of [fol. 42] the Industrial Workers of the World, but are a branch of the American Federation of Labor. I had copied it off of a book. I have sung this song, but don't know whether other members of the

organization sing it or not. The expressions do not convey my idea of what the organization stands for. I was just singing this song purely for pleasure.

"Mr. Quinlan: Now, Your Honor, without telling you what it is, we would like to have the jury excused for about five minutes while we present a matter to you.

The Court: All right. Gentlemen, you will pass out. Don't remain within hearing distance of the court room, and wait until you are called. During your separation remember the admonishment I have given you before in regard to not talking or permitting anybody else to talk to you about this case or talk in your presence about this case. Just pass out and remain until you are called." (Jury retires from the court room.)

Mr. Quinlan: Now, Your Honor, I want to read to you Section 8152 of the General Statutes of the State of Kansas for the year 1915.

"When it appears at any time before verdict or judgment that the defendant is prosecuted in a county not having jurisdiction, the court may order the venue of the indictment or information to be corrected, and direct that all the papers and proceedings be certified to the proper court of the proper county, and recognize the defendant and witnesses to appear at such court on the first day of the next term thereof, and the prosecution shall proceed in the latter court in the same manner as if it had been there commenced."

Mr. Quinlan: And Section 8153:

[fol. 43] "When a jury has been impaneled in either case contemplated in the last two preceding sections, such jury may be discharged without prejudice to the prosecution."

The Court: Let me look at that section. I think I am familiar with that section.

The Court: Let's look at that information.

The Court: Did you make that application?

Mr. Carroll: They have made application and there is no objections.

Mr. Quinlan: No, we haven't made an application. I just want to find out what the court would think about it and I don't want the jury to hear it.

Mr. Carroll: Are you going to make the application or not?

Mr. Jones: I don't understand that we are required to make any application under that statute. Maybe the court would prefer that you not make the application.

The Court: Somebody ought to call the court's attention to it when it appears during the trial. Of course, here's the one thing I think, that possibly could be or could not be. The state would have the right. This defendant, it is true, has testified that was in Haven, Kansas, and, of course, if it was in Haven, Kansas, and the jury should believe the defendant's statement about it, of course, you could not get a conviction.

Mr. Carroll: Your Honor, we can produce these witnesses later on, and we will be able to produce these witnesses later and show that these applications were taken at Haven, Kansas; I just got in this case this morning and I know we can do that.

[fol. 44] The Court: The gist of this action is getting these men whom you have alleged there as members. You don't even allege any other persons, do you?

Mr. Quinlan: No.

The Court: Then, if the evidence should show that it was in Haven, Kansas——

Mr. Quinlan (interrupting): Well, here's the thing: There is—we maintain it was done in Rice County, Kansas. The defendant has got on the stand himself and admitted the doing of these acts, but he said he does it in another county. I suppose that would be a question for the jury to determine—what county he did it in, if any.

The Court: Here's the thing: If the jury should believe him; that it was done in that county, of course, you would not have no case. If it was tried in that county, as far as soliciting members was concerned, by that time he would be in proper shape to declare it was done in Oklahoma.

Mr. Carroll: We have got this testimony reserved.

The Court: Unless the state wants to rely on their evidence in this case.

Mr. Quinlan: I think we had better rely on our testimony, but I just wanted to call your attention to that statute, so if you thought it was necessary to do it, why you could do it. I think we have proved as far as that is concerned, that it was done in Rice County. I just wanted to put that up to you so if you thought it should be certified over there you can do it.

The Court: Of course, here's the one thing: You have absolutely set out these certain names, instead of possibly naming others. There was no testimony as I remember of the sheriff that he ad-[fol. 45] mitted the getting of these identical men in Rice County.

Mr. Quinlan: Yes, the testimony of the sheriff was that he had these three and asked him about it and he said he got two of them in Geneseo.

The Court: Yes, that is right, I remember that.

Mr. Carroll: Got two of them there at Geneseo.

The Court: Of course, the court would not attempt to send this case anywhere else unless the state felt this evidence was not sufficient.

Mr. Quinlan: No, I think we had better let the jury consider. We have gone this far. It is really up to you, of course, but it does not absolutely show that it was done in Rice County.

The Court: It does not absolutely disclose by the evidence that it was not done in Rice County.

(Jury returns to the court room.)

Mr. Quinlan: I believe that is all" (Trans. 139-140-141-142).

Redirect examination of Harold Fiske:

This organization does not teach or suggest that it will get hold of the earth or control the earth industrially in any criminal way or unlawful manner. It is in a peaceable manner. We would have control when a point has been reached where the members who belong to the organization are in the majority. I do not believe in criminal syndicalism or sabotage (Trans. 143).

I got these applications of Earl Summers, George Kelley and Henry Lang on Saturday, June 30th. They are dated July 1st, 1923. I wrote that date on there because it is a form that whenever [fol. 46] we are initiating a member after the 25th of the month to initiate him in the next month, and that would make him pay dues for the month of July and not for June (Trans. 144). So the dues I collected from Earl Summers, George Kelley and Henry Lang were collected in the month of June and dated July 1st, for the purpose of showing their dues paid in the month of July instead of during the month of June, and so I made the report.

"Q. Did you make any statements to them advocating or suggesting the duty, necessity, propriety and expediency of crime?
A. No, sir.

Mr. Quinlan: Now, just a minute. To which the state objects as calling for the conclusion of this witness, and for the further reason that the question is leading and suggestive.
The Court: Sustained for the latter reason.

Q. Did you make any statement to either of them, to either of these three persons in which you advocated the overthrow of the government by unlawful means?

Mr. Quinlan: Now, just a minute. I object——
The Court (interrupting): I do not understand that that is charged in the information.
Mr. Quinlan: Well, it wouldn't make any difference. Objected to for the reason it is leading and suggestive and for the further reason it is calling for a conclusion of this witness.
The Court: It will be sustained for that reason.

Q. Have you ever advocated the overthrow of the government by means of warfare?

Mr. Quinlan: Just a minute. Object to that as calling for a conclusion of this witness and incompetent and irrelevant and imma- [fol. 47] terial. He can say what he did or said, Your Honor.
The Court: Well, I don't think that part of it is good. I can't see the competency of it as I understand the issues in this case. I understand it is not a question of what he has done himself. The gist of this action is getting these members sign it.
Mr. Carroll: "Did then and there unlawfully, wilfully and by word of mouth and by publically displaying."
Mr. Jones: You didn't read quite far enough.

The Court: I don't think there is any dispute, gentlemen. The gist of this action is getting these members sign it.

Mr. Carroll: Yes.

The Court: I will permit him to answer the question.

(Reporter reads the question.)

A. No, sir.

The Court: Gentlemen, we are not getting along very fast.

Mr. Carroll: Your Honor, this information—I think I am right——

The Court: Well, he has answered your question. I don't think it is, but to save time I have let him answer the question. He has absolutely answered it. Go to something else.

Q. Have you ever attended the international meetings of this organization?

A. No; I have not.

Mr. Carroll: I think that is all.

Mr. Quinlan: That is all.

(Trans. 145-146-147.)

[fol. 48] INSTRUCTIONS OF THE COURT TO JURY

Thereupon, the defendant rested and the court instructed the jury as follows:

"The Court: Gentlemen of the jury, you will listen to the instructions of the court:

1. The information in this case charges in substance that on or about the 2nd day of July, 1923, and in the County of Rice and State of Kansas, one Harold B. Fiske then and there being did then and there unlawfully, feloniously, and wilfully, by word of mouth and by publicly displaying and circulating certain books and pamphlets and written and printed matter, advocate, affirmatively suggest and teach the duty, necessity, propriety and expediency of crime, criminal syndicalism, and sabotage by then and there unlawfully, wilfully, knowingly and feloniously persuading, inducing and securing Henry Lang, Earl Summers and George Kelley to sign an application for membership in a society known as the Agriculture Workers Industrial Union No. 110 and by issuing to the said Henry Lang, Earl Summers and George Kelley membership cards, commonly known as the Red Card, in said Agriculture Union No. 110 which said Agriculture Workers Industrial Union No. 110 is a branch of and component part of the Industrial Workers of the World organization, said defendant then and there knowing that said organization unlawfully teaches, advocates, and affirmatively suggests: 'That the working class and the employing class have nothing in common, and that there can be no peace so long as

hunger and want are found among millions of the working people and the few, who make up the employing class, have all the good [fol. 49] things of life.' And that: 'Between these two classes a struggle must go on until the Workers of the World organize a class, take possession of the earth, and the machinery of production and abolish the wage system.' And that: 'Instead of the conservative motto "A fair day's wages for a fair day's work" we must inscribe on our banner the revolutionary watchword, "Abolition of the wage system."'

'By organizing industrially we are forming the structure of the new society within the shell of the old.'

All contrary to and in violation of Chapter 37 of the Laws of Kansas for the year, 1920.

2. To the charge contained in the information the defendant has entered his plea of not guilty, and this plea puts in issue every material allegation alleged in the information, and before the defendant can be lawfully convicted you must be satisfied from the evidence and beyond a reasonable doubt:

1st. That the defendant secured the applications of Howard Lang, Earle Summers and George Kelley, and induced any one or either of them to sign an application for membership in a society known as the Agriculture Workers Industrial Union No. 110.

2nd. That said Agriculture Workers Industrial Union No. 110 is a branch of and a component part of the Industrial Workers of the World organization.

3rd. That the Industrial Workers of the World organization, commonly called the I. W. W., is an organization that teaches criminal syndicalism as hereinafter defined.

4th. That said defendant secured application for membership from the said Henry Lang, Earle Summers and George Kelly, or any one or either of them, in Rice County, Kansas, on the 2nd day [fol. 50] of July, 1923, or within two years prior to the 2nd day of July, 1923.

3. Section 228 of the Crimes and Punishments Act of the State of Kansas, reads as follows:

Section 228:

'A defendant is presumed to be innocent until the contrary is proved. When there is a reasonable doubt whether or not his guilt is satisfactorily shown he must be acquitted.'

4. The phrase reasonable doubt as used in these instructions is defined as follows:

A reasonable doubt is that state of the case which, after an entire comparison and consideration of all the evidence and circumstances proven upon the trial leaves the minds of the jurors in that condition that they cannot say that they have an abiding conviction to a moral certainty of the truth of the charge, that is to a certainty that convinces and directs the understanding and satisfies the reason and judgment of those who are bound to act conscientiously upon it.

5. This action is being prosecuted under Chapter 37 of the Laws of Kansas for the year 1920, which reads as follows:

Section 1 of Chapter 37, of the Laws of Kansas, of 1920, defines the crime of syndicalism as follows:

Section 1. 'Criminal syndicalism is hereby defined to be the doctrine which advocates crime, physical violence, arson, destruction of property, sabotage, or other unlawful acts or methods, as a means of accomplishing or effecting industrial or political ends, or as a means of effecting industrial or political revolution, or for profit.'

[fol. 51] Section 2 of said chapter defines the crime of sabotage as follows:

Section 2. 'Sabotage is hereby defined to be malicious, felonious, intentional or unlawful damage, injury or destruction of real or personal property of any employer, or owner, by his or her employe or employes, or any employer or employers or by any person or persons, at their own instance, or at the instance, request or instigation of such employes, employers, or any other person.'

6. Section 3 of Chapter 37, of the laws of 1920, provides as follows:

Any person, who, by word of mouth, or in writing, advocates, affirmatively suggests or teaches the duty, necessity, propriety or expediency of crime, criminal syndicalism, or sabotage, or who shall advocate, affirmatively suggest or teach the duty, necessity, propriety or expediency of doing any act of violence, the destruction of or damage to any property, the bodily injury to any person or persons, or the commission of any crime or unlawful act as a means of accomplishing or effecting any industrial or political ends, change or revolution, or for profit; or who prints, publishes, edits, issues, or knowingly circulates, sells, distributes or publicly displays any books, pamphlets, paper, handbill, poster or writen or printed matter in any form whatever, containing matter advocating, advising, affirmatively suggesting or teaching crime, criminal syndicalism, sabotage, the doing of any act of physical violence, the destruction of or damage to any property, the injury to any person, or the com-[fol. 52] mission of any crime or unlawful act as a means of accomplishing, effecting or bringing about any industrial or political ends or change, or as a means of accomplishing, effecting or bringing about any industrial or political revolution, or for profit, or who shall openly, or at all attempt to justify by word of mouth or writing, the commission or the attempt to commit sabotage, or any act of physical violence, or the injury of any person or the commission of any crime, or unlawful act, with intent to exemplify, spread, or teach, or affirmatively suggest criminal syndicalism, or organizes, or helps to organize or become a member of, or voluntarily assembles with any society or assemblage of persons which teaches, advocates or affirmatively suggests the doctrine of criminal syndicalism, sabotage, or the necessity, propriety or expediency of doing any act of physical violence or the commission of any crime or unlawful act as a means of accomplishing or effecting any industrial or political ends, change or revolution or for profit, is guilty of a felony, and upon conviction thereof shall be punished by imprison-

ment in the state penitentiary for a term not less than one year nor more than ten years, or by a fine of not more than $1,000 or by both such imprisonment and fine."

7. The law makes the defendant a competent witness to testify in his own behalf. This is simply a privilege of which he may avail himself, and where the defendant does so and testifies, it is the duty of the jury to receive his testimony, consider it and weigh it by the same rules that apply to the consideration of the testimony of other witnesses in the case, and then give to it such weight as you believe it is entitled to; but should he refrain from testifying on his own behalf, his failure in that respect cannot be considered as a fact or [fol. 53] circumstance against him, for it is the duty of the jury to determine the facts in the case from the evidence which comes to it from the witness stand and not from what might be offered. His failure to testify cannot mitigate against him.

8. If you believe that any witness who has testified in the case has deliberately and wilfully sworn falsely to any material matter you are at liberty to wholly disregard the testimony of any such witness, excepting where it is coroborated by other competent and credible testimony, but you are not bound to do so. You may still consider the testimony of such witness, and weigh it in connection with all the other facts and circumstances, proven upon the trial, and then give it such weight as you believe it to be entitled to.

9. You, gentlemen, are the sole and exclusive judges of all questions of fact in this case. You are also the judges of the evidence and of the weight which ought to be given to it and to every part of it. In determining the weight which ought to be given to the testimony of the witness you may take into consideration their demeanor upon the witness stand, their apparent intelligence and candor, their bias or prejudice, if any appears, either for or against either party to the action, their means of knowledge of the facts related in their testimony, the reasonableness of the story which they have told, or their interest, if any, in the determination of the case, and from these and from all other facts and circumstances surrounding the case so far as they have been proven upon the trial fully and conscientiously considered and weighed determine the facts in the case.

10. I have prepared for the use of the jury two forms of verdict, one will be for a finding of guilty as charged in the information, and one will be for a finding of not guilty.

[fol. 54] When you retire to your jury room organize by selection of one of your number as foreman and then proceed with your deliberations, and when you have agreed upon a verdict use the form which agrees with your findings, sign it by your foreman and return with it into court."

(Trans. 148-149-150-151-152-153-154.)

Thereupon, the jury retired and later returned with their verdict, as shown in the journal entry.

[Title omitted]

MOTION IN ARREST OF JUDGMENT—Filed Sept. 19, 1923

Comes now the defendant, Harold B. Fiske, by his attorney, Chas. L. Carroll, and moves the court to arrest the pronouncement of sentence and that no judgment be rendered on the verdict of guilty as returned by the jury in the above entitled cause on the 18th day of September, 1923, for the following reasons, to-wit:

First. That the county attorney of Rice County, State of Kansas, who caused the information to be made in the above cause had no legal authority to inquire into the offense charged, by reason of it not being within the jurisdiction of the court; and

Second. That the evidence adduced at the said trial of said cause and the facts stated do not constitute a public offense, and do not substantiate the charges as alleged in the said information.

[fol. 55] Wherefore, this defendant moves for an arrest of judgment in the above entitled cause.

Chas. L. Carroll, Attorney for Defendant.

[File endorsement omitted.]

The motion in arrest of judgment was by the court overruled.

[Title omitted]

MOTION FOR NEW TRIAL—Filed Sept. 19, 1923

Comes now the defendant, Harold B. Fiske, by his attorney, Chas. L. Carroll, of Great Bend, Kansas, and moves the court to grant the defendant a new trial for the following causes, to-wit:

First. For lack of time and opportunity to properly prepare a defense to the information in the above entitled cause; and

Second. Accident or surprise which ordinary prudence could not have guarded against whereby defendant was prevented from having a fair trial; and

Third. That the court erred in allowing the introduction of evidence, that is, admitted illegal testimony, to the prejudice of the defendant; and

[fol. 56] Fourth. Newly discovered evidence material for the defendant, which could not, with reasonable diligence, have been discovered and produced at the trial; and

Fifth. Not afforded an opportunity to present his evidence and be heard on the merits of the case; and

Sixth. That the verdict was given under the influence of passion and prejudice; and

Seventh. That members of the jury have been guilty of misconduct which tended to prevent a fair and due consideration of the case; and

Eighth. That the verdict was decided by means other than a fair expression of opinion on the part of all the jurors; and

Ninth. That the court misdirected the jury in a material matter of law; and

Tenth. That the verdict is contrary to the law and the evidence; and

Eleventh. That the verdict is wholly unsupported by the evidence; and

Twelfth. Erroneous rulings and instructions of the court; and

Thirteenth. That the verdict was procured by the corruption of the party plaintiff and the complaining witness of the party plaintiff.

Wherefore, and by reason of the above and foregoing, the defendant moves the court to grant this defendant a new trial.

Chas. L. Carroll, Attorney for Defendant.

[fol. 57] [File endorsement omitted.]

Affidavit in Support of Motion for New Trial—Filed Sept. 20, 1923

State of Kansas,
Rice County, ss:

Harold B. Fiske, of lawful age, being duly sworn, on his oath deposes and says: That he is the defendant as named in the above entitled cause; that Harold O. Mulks, Esq., of Chicago, Illinois, was of counsel for this defendant in said cause; that owing to other matters the said Harold O. Mulks, Esq., was unable to be present at the time said cause was set for trial, namely, the 18th day of September, 1923; that by reason of his absence and failure to be present Chas. L. Carroll, Esq., of Great Bend, Kansas, was requested by the said Harold O. Mulks, Esq., to represent this defendant in said hearing, and that said Chas. L. Carroll, Esq., knew nothing of the nature of the case until the morning of the said 18th day of September, 1923; that the information in said cause was filed in the office of the clerk of the District Court of Rice County, Kansas, on the 1st day of September, 1923, and that said information set forth that this defendant has persuaded, and induced Henry Lang, Earl Summers and George Kelley to sign applications for membership in a society known as the Agriculture Workers Industrial Union No. 110 and by issuing mem-

bership cards to said persons in said organization; that this defendant [fol. 58] until the day and date of his trial did not know that the plaintiff claimed and alleged that this defendant had persuaded and induced the said persons to make such applications for membership or that he had issued membership cards to such persons; that this defendant could not have with reasonable diligence procured or produced the said persons as witnesses in his behalf at the time of the said trial within the time that the said information was filed and the day and date of his said trial; that this defendant verily believes that he can now obtain the testimony of said witnesses and each of them; that said persons will testify to the following facts, to-wit: That this defendant became acquainted with them and each of them at the Town of Haven, Kansas, which town this defendant is now informed is in Reno County, State of Kansas, and which fact this defendant did not heretofore know of; that at the said Town of Haven, Kansas, he had a conversation with them and each of them; that he at no time ever met the said persons or either of them at Geneseo, Kansas, or within the boundaries of what is Rice County, Kansas, and that he had no talk or conversation with either of the said persons within the said County of Rice, State of Kansas; and this affiant states that the said persons and each of them will so testify to the above and foregoing facts as to the time and place of their meeting and acquaintance and their conversation; and affiant further says that he did at no time heretofore did he ever see, meet or talk with the said persons at the Town of Geneseo, Kansas, or within the said Rice County, Kansas, and that the said persons will corroborate this affiant in such testimony. Further affiant says not.

Harold B. Fiske.

[fols. 59 & 60] Subscribed and sworn to before me on this 20th day of September, 1923, Bunn E. Tener, Clerk of District Court of Rice County, Kansas.

[File endorsement omitted.]

The motion for a new trial was argued to the court and was overruled.

On September 20th, 1923, the defendant was sentenced by the court to serve not less than one nor more than ten years at hard labor at Lansing until discharged according to law.

Thereupon a notice of appeal was duly prepared and served upon the county attorney, L. E. Quinlan, and the clerk of the court."

(Trans. 155-156-157-158-159.)

JOURNAL ENTRY OF VERDICT, JUDGMENT, AND SENTENCE—Omitted; printed side page 4 ante

[fol. 61] NOTICE OF APPEAL

Notice of appeal was served and filed as provided by law.

CERTIFICATE

The above and foregoing is a true and correct abstract of the proceedings in the above entitled cause.

Charles L. Carroll, of Great Bend, Kansas; A. M. Harvey, Randal C. Harvey, Paul L. Harvey, of Topeka, Kansas, Attorneys for Appellant.

[fol. 62] ASSIGNMENTS OF ERROR

I

The court erred in overruling defendant's motion to quash the information.

II

The court erred in overruling defendant's application for continuance.

III

The court erred in overruling defendant's objections to evidence produced by plaintiff.

IV

The court erred in admitting in evidence, over defendant's objections, plaintiff's Exhibits 6, 7, 8, 12, 11, 3, 22, 21, 17, 1, 5, 15, 26, 18, 19, 29, 28, 14, 16, 10, 20 and 2.

V

The court erred in overruling defendant's motion for judgment.

VI

The court erred in overruling defendant's demurrer to the evidence.

VII

The court erred in refusing to certify the case to the District Court of Reno County.

VIII

The court erred in sustaining plaintiff's objections to defendant's evidence.

[fol. 63]

IX

The court erred in overruling the defendant's motion in arrest of judgment.

X

The court erred in overruling defendant's motion for a new trial.

XI

The court erred in refusing to quash the information, in overruling the demurrer to the evidence, and in overruling the motion in arrest of judgment, because the information and the cause of action attempted to be proved were based upon Chapter 37 of the Session Laws of Kansas for the special session of 1920, which, insofar as it sustains this prosecution is in violation of the Constitution of the State of Kansas, and especially of Section 1 of the Bill of Rights thereof, which provides:

"All men are possessed of equal and inalienable natural rights, among which are life, liberty, and the pursuit of happiness,"

and of Section 11 of the Bill of Rights thereof, which provides:

"The liberty of the press shall be inviolate; and all persons may freely speak, write or publish their sentiments on all subjects, being responsible for the abuse of such right; and in all civil or criminal actions for libel, the truth may be given in evidence to the jury, and if it shall appear that the alleged libelous matter was published for justifiable ends, the accused party shall be acquitted,"

[fols. 64 & 65] and of Section 3 of the Bill of Rights thereof, which provides:

"The people shall have the right to assemble, in a peaceable manner, to consult for their common good, to instruct their representatives, and to petition the government, or any department thereof, for the redress of their grievances,"

and of the Constitution of the United States and especially of the Fourteenth Amendment thereto, which provides in part as follows:

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

XII

The court erred in admitting in evidence, over the objection of the defendant, exhibits, papers and documents obtained by unreason-

able search and seizure from the defendant, in violation of the Constitution of the State of Kansas, and especially of Section 15 of the Bill of Rights thereof, which provides:

"The right of the people to be secure in their persons and property against unreasonable searches and seizures, shall be inviolate; and no warrant shall issue but on probable cause, supported by oath or affirmation, particularly describing the place to be searched and the persons or property to be seized."

[fols. 66 & 67] IN SUPREME COURT OF KANSAS

[Title omitted]

ARGUMENT AND SUBMISSION—October 7, 1924

This cause comes on to be heard upon the appeal papers and abstract of the record from the district court of Rice county; and thereupon after oral argument by A. M. Harvey for the appellant, said cause is submitted on brief of counsel for the appellant and taken under advisement by the court.

[fols. 68 & 69] IN SUPREME COURT OF KANSAS

[Title omitted]

JUDGMENT—November 8, 1924

This cause comes on for decision and thereupon it is ordered and adjudged that the judgment of the court below be affirmed. It is further ordered that the appellant pay the costs of this case in this court taxed at $— and hereof let execution issue.

[fol. 70] IN SUPREME COURT OF KANSAS

[Title omitted]

OPINION—Filed Nov. 8, 1924

Syllabus by the Court

MASON, J.:

1. It is held that no abuse of discretion is shown in the overruling of a motion for a continuance.

2. The question whether a criminal prosecution was brought in the proper county is held to have been one of fact for the determination of the jury.

3. It is held that if the corpus delicti cannot be proved by extra judicial admissions of the defendant there was in this case such corroborative evidence as to prevent the application of the rule.

4. The rule is applied that articles are not rendered inadmissible in evidence by the fact that they were wrongfully obtained.

5. An information is held sufficient to charge a violation of the statute penalizing criminal syndicalism.

6. The evidence is held to support a conviction on a charge of criminal syndicalism.

7. Constitutional guarantees of freedom of speech are not violated by a statute penalizing the advocacy of violence in bringing about governmental changes.

[fol. 71] Appeal from Rice District Court. C. R. Douglass, Judge. Opinion Filed November 8, 1924. Affirmed

Charles L. Carroll, of Great Bend, and A. M. Harvey, Randal C. Harvey and Paul L. Harvey, all of Topeka, for the appellant.

C. B. Griffith, attorney-general and Bronce Jackson, county attorney, for the appellee.

All the justices concurring, except Harvey, J. who did not sit. A true copy. Attest:

D. A. Valentine, Clerk Supreme Court. (Seal of the Supreme Court, State of Kansas.)

[fol. 72] The opinion of the court was delivered by Mason, J.:

Harold B. Fiske appeals from conviction upon a charge of violating the statute which defines criminal syndicalism and penalizes its advocacy.

1. The offense is alleged to have been committed on July 2, 1923. A term of court began September 4, 1923, on which day the information was filed. On September 18—the day the case was tried—the defendant filed a motion for a continuance until a later date or until the next term on the ground that his regular counsel, a resident of Chicago, was unable to be present because of being of counsel in cases pending in another court and his local attorney had not had time to prepare a proper defense. The overruling of the motion is complained of. The matter was within the discretion of the court and it cannot be said that any abuse of discretion was shown.

2. It is contended that the case should have been transferred to Reno County under the statute authorizing such procedure where it develops that a prosecution is brought in a county not having jurisdiction. (R. S. 62-1442.) The defendant testified that he took two applications for membership in the I. W. W. (upon which conduct the state relied for conviction) at Haven, in Reno County, on June 30, saying however that he went from that county into Rice that day and was in the latter county all of July 1, the day the application cards bore date. He gave an explanation consistent with the

applications having been made June 30, but its credibility was one of the issues of fact. There was also evidence that the sheriff of Rice County said to him in Geneseo, in that county—"Have you got any members here in this county?" and that he answered "Yes, two." There was other testimony to the same effect. The question whether the applications were taken in Rice County was therefore a fair one for the jury.

3. It is urged that there was no evidence of the defendant having induced any one to join the Industrial Workers of the World except [fol. 73] his own statements made out of court, and that the corpus delicti cannot be established by his extra judicial admissions. The rule, if otherwise sound and applicable, does not apply here because of the corroboration afforded by the signed cards in the possession of the defendant which were identified by him as applications for membership.

4. Without a warrant the defendant was arrested and papers in his possession were seized. The use of the papers in evidence is objected to on the ground of their illegal seizure. This court has adopted and recently confirmed the rule that articles are not rendered inadmissible as evidence by the fact that they were wrongfully obtained. (The State v. Johnson, 116 Kan. 179, — Pac. —.)

5. Error is assigned in the overruling of a motion to quash the information. The statute under which the prosecution is brought, so far as now important, reads:

"Any person who, by word of mouth, or writing, advocates, affirmatively suggests or teaches the duty, necessity, propriety or expediency of crime, criminal syndicalsm, or sabotage, or who shall advocate, affirmatively suggest or teach the duty, necessity, propriety or expediency of doing any act of violence, the destruction of or damage to any property, the bodily injury to any person or persons, or the commission of any crime or unlawful act as a means of accomplishing or effecting any industrial or political ends, change or revolution, or for profit; * * * is guilty of felony." (R. S. 21-303.)

"Criminal syndicalism is hereby defined to be the doctrine which advocates crime, physical violence, arson, destruction of property, sabotage, or other unlawful acts or methods, as a means of accomplishing or effecting industrial or political ends, or as a means of effecting industrial or political revolution, or for profit." (R. S. 21-301.)

The material part of the information reads:

[fol. 74] "That on or about the 2nd day of July, 1923, and in the County of Rice and State of Kansas, one Harold B. Fiske then and there being, did then and there unlawfully, feloniously and wilfully, by word of mouth and by publicly displaying and circulating certain books and pamphlets and written and printed matter, advocate, affirmatively suggest and teach the duty, necessity, propriety and expediency of crime, criminal syndicalism, and sabotage by then and there unlawfully, wilfully, knowingly and feloniously persuading, inducing and securing Henry Lang, Earl

Summers and George Kelley to sign an application for membership in a society known as the Agricultural Workers Industrial Union No. 110 and by issuing to the said Henry Lang, Earl Summers, and George Kelley membership cards, commonly known as the Red Card, in said Agriculture Workers Industrial Union No. 110, which said Agriculture Workers Industrial Union No. 110 is a branch of and component part of the Industrial Workers of the World organization, said defendant then and there knowing that said organization unlawfully teaches, advocates and affirmatively suggests:

"'That the working class and the employing class have nothing in common, and that there can be no peace so long as hunger and want are found among millions of working people and the few who make up the employing class, have all the good things of life.' And that, 'Between these two classes a struggle must go on until the workers of the World organize a class, take possession of the earth, and the machinery of production and abolish the wage system.' And that, 'Instead of the conservative motto, "A fair day's wages for a fair day's work" we must inscribe on our banner the revolutionary watchward, "Abolition of the wage system."'

"'By organizing industrially we are forming the structure of the new society within the shell of the old.'"

The information charges the defendant in so many words with having done the things prohibited by the statute, and the question presented is whether the specifications descriptive of the manner in which the acts were done bear out the general terms of the accusation. It does not in set phrase allege that the association known as [fol. 75] the Industrial Workers of the World advocates, affirmatively suggests or teaches criminal [illegible] but when read as a whole it clearly signifies this, and [illegible] the language quoted (which the evidence shows to be taken from the preamble of the constitution of that organization) was employed to express that doctrine. We regard persuading and inducing others to join an association as one of the methods of advocating, affirmatively suggesting and teaching the doctrines in which it is based. An information has been held insufficient which merely charges the defendant in general terms with having advocated, taught, suggested certain doctrines, the court saying that although words used by way of advocacy, teaching, or suggestion, need not be set out with verbal accuracy, "the content of the propagation should be fairly indicated." (The State v. Breen, 110 Kan. 817, 205 Pac. 632.) Here the method of propagation is specifically pointed out—the inducing others to become members of an organization devoted to such propaganda. This reasonably advises the defendant of the nature of the charge. It is not necessary that the pleader should go further and set out the arguments that were used to attain the end sought.

6. The defendant asserts that there was no evidence to support the verdict of guilty. He testified that he had secured the applications of Henry Lang, Earl Summers and George Kelley and issued them

membership cards in the I. W. W., saying however that this was not done in Rice County—a matter which has already been discussed. He continued:

"I understand what the Industrial Workers of the World organization teaches. I understand that it teaches, advocates and states that the working class and the employing class have nothing in common and that there can be no peace so long as a few, who make up the employing class have all of the good things of life. I understand that between these two classes a struggle must go on until the workers of the world organize as a class, take possession of the earth and the machinery of production, and abolish the wage system. I understand that instead of the conservative motto 'A fair day's wages for a fair day's work' we must inscribe on our banner the revolutionary watchward 'abolition of the wage system.' I understand [fol. 76] that by organizing industrially we are forming the structure of the new society within the shell of the old. We are organizing with industrial unions to take care of the labor situation in this country and in the world. That means that there won't be any capital, and that means that everybody—that one will be just as well off as the other; at such time as it can be done; and means that everybody will work. That is what it means when it says 'By organizing industrially we are forming the structure of the new society within the shell of the old.' The new society will be a new organization—new control—control of industry. By 'in the shell of the old,' I mean it will be forward, and instead of breaking up, we will not destroy anything, but we will build them. We will not rake over property, but everybody will own property. This will be forced in economically. That is what I was teaching and suggesting when I took these applications. I didn't come right out and say that. The working class will enforce the laws when they are organized sufficiently. The people of the earth will make the laws; we will all belong to the working class * * * They came to me and asked me if I knew where there was an I. W. W. organizer, and I told them I was one and they asked me to explain it to them and I explained it to them. I explained the principles of the organization as far as I knew."

The language quoted from the I. W. W. preamble need not—in order to sustain the judgment—be held necessarily and as a matter of law to advocate, teach or even affirmatively suggest physical violence as a means of accomplishing industrial or political ends. It is open to that interpretation and is capable of use to convey that meaning. The construction to be placed upon it in the connection in which is was employed was submitted as an issue of fact by an instruction that no conviction could be had unless from the evidence and beyond a reasonable doubt the jury were satisfied (among other things) that the organization commonly called the I. W. W. is one that teaches criminal syndicalism as defined in the statute. The Jury were not required to accept the defendant's testimony as a candid and accurate statement. There was room for them to

[fols. 77 & 78] find, as their verdict show they did, that the equivocal language of the preamble and of the defendant in explaining it to his prospects was employed to convey and did convey the sinister meaning attributed to it by the state.

7. A final contention is that the statute violates the provision of the state constitution that "The liberty of the press shall be inviolate; and all persons may freely speak, write or publish their sentiments on all subjects, being responsible for the abuse of such rights" (Bill of Rights,§11) and (because of invading the fundamental rights sought to be thereby protected) also is obnoxious to the due process of law clause of the 14th amendment to the federal constitution. Statutes penalizing the advocacy of violence in bringing about governmental changes do not violate constitutional guarantee of freedom of speech. Their wisdom and justice are matters for the determination of the legislature. Cases holding valid acts of the same type as that here involved are collected in recent notes, (1 A. L. R. 336; 20 A. L. R. 1535, 1543.)

The Judgment is affirmed.

All the justices concurring except Harvey, Jr., who did not sit. A true copy. Attest:

D. A. Valentine, Clerk Supreme Court. (Seal Supreme Court, State of Kansas.)

[fol. 79] IN SUPREME COURT OF KANSAS

[Title omitted]

PETITION FOR REHEARING—Filed Nov. 25, 1924

The appellant respectfully moves and petitions the court that a rehearing be granted to him in the above entitled cause.

In support of this motion, the appellant particularly urges a reconsideration of that portion of the decision wherein the court held that the information charged and the evidence proved an offense under the criminal syndicalism act, and of that portion of the decision which held that such act, as applied in this case, did not contravene the provisions of the state and federal constitutions.

Recent Decisions on Questions of Evidence

We first call to the attention of the court recent cases concerning the evidence required to support a conviction for criminal syndicalism, from states which have often dealt with these questions. These decisions support our contention that the information and [fol. 80]evidence did not charge or prove a violation of the statute in the case at bar; and we earnestly request a careful consideration of the same by this court.

In People v. Flanagan et al., (Cal. App.) 223 Pac. 1014, the court reversed a conviction for criminal syndicalism, holding that in such a case the defendant's knowledge of the purposes of the organization is an essential element of the crime; and that a conspiracy is not criminal, however baneful its object, if its accomplishment is sought by peaceful means only. We quote from the opinion in that case:

"When the question under consideration has been expressly decided by the higher courts of this state, it may be implied from the opinion in the case of People v. Steelik, supra, that knowledge of the purposes of the organization is an essential element of the crime here charged. It is there said that 'there was * * * evidence before the jury that the defendant * * * knowingly beonged to a conspiracy to commit crimes'; that it was alleged 'that the defendant was a member of the I. W. W., knowing its alleged purposes'; that 'the testimony as to his statements and activities were, admissible to show his knowledge of and sympathy with the purposes of the organization'; and that the evidence justified the conviction of the defendant 'in that he knowingly belonged to an organization which in its nature was a criminal conspiracy.'

* * * * * * *

"The defendants were not on trial for their or other conspirators' moral or religious beliefs, or for the character of the industrial and political scheme which the organization purposes to establish, but for the unlawful means to be advocated and employed by the conspiracy in effecting its ultimate object. However beneficent that object may be, the conspiracy is criminal if it advocates the accomplishment thereof by 'unlawful acts of force and violence or [fol. 81] unlawful methods of terrorism,' and however baneful the ultimate object, the law does not make criminal the advocacy thereof if peaceful means only, such as are sanctioned by our constitution and laws, are employed. The admission of the foregoing evidence was error. It was proper for the prosecution to prove that the organization proposes to accomplish an industrial and political change, but such purpose is shown by practically every piece of I. W. W. literature admitted in evidence, and no member or witness has ever denied that the organization advocates making a change. The character of the system to be established is immaterial in the trial of a case arising under the act."

In Ex Parte Moore (Idaho) 224 Pac. 662, the court discharged the petitioner upon a writ of habeas corpus before trial, where it was admitted that he was a member of the I. W. W. and certain literature was found on him, including a leaflet containing the preamble of the I. W. W. (the same as in this case) and also referring to "the strike on the job" as follows:

"The Strike on the Job. During years of industrial depression and for some months of every year, the country swarms with millions of men looking for work. These men are to a great extent ignorant of unionism, and uneducated to their own class interests.

Generally speaking they all harbor ambitions to be President of the United States, or a general in the army, and believe that the best and surest way of arriving at that pinnacle of success is to follow the teachings of their home town Y. M. C. A., which is to take the first job that offers, irrespective of wages, hours, conditions or strikes, etc. This type of human is easily induced to work on struck jobs; therefore, in times of great unemployment, a strike off the job is a risky proposition. In addition to this risk of wholesale scabbing (that the miners and shopmen had to contend with during [fol. 82] the past year), the lumber workers on strike would have difficulty in financing the strike, the difficulty being severe in proportion to the size of the strike and the extent of unemployment. All of this would involve hunger and privation that the strike on the job makes unnecessary. Also, why give the scab a job when union men can hold it and improve his conditions while working?

"The idea of the strike on the job is for the entire crew or as many of the crew as are organized to co-operate to do just as little work as they can possibly get by with. The technic of logging operations offers countless opportunities to delay work, and to slow down on the entire process of the lumber industry. If the boss discharges a crew it should be a simple matter to supply him with another union crew who will repeat the process. The wider spread this strike becomes the more effective it will be. If the morality of slowing down on the job troubles the ethical mind of the sensitive unorganized worker, just tell him the truth, which is that if the worker was to draw a full day's pay for only one hour's work a day the boss would even then be paying no more than the one hour's work is really worth. In the other seven, eight or nine hours' work the worker produces wealth that becomes dividends to the banker, profits to the boss, and campaign funds and graft for the politician."

The court held that the above language referring to the strike on the job, did not clearly advocate sabotage, and discharged the petitioner. Although the court set up in full in its opinion the "preamble" referred to, it did not discuss the same with reference to the offense and thus clearly indicated that the court found nothing in this preamble to justify holding the defendant.

In People v. Leonard et al., (Cal. App.) 225 Pac. 461, a conviction for criminal syndicalism was reversed on the ground that the evi- [fol. 83] dence was insufficient to sustain a conviction, the documentary evidence consisting of an I. W. W. button and suitcase, containing I. W. W. literature found on defendants, although there was testimony that defendant Fink had attended a meeting in the county and been in the hall selling the papers referred to. The court reversed the judgment in emphatic terms, stating at the close of its opinion "It is just to remark that the Attorney General, in the brief filed by him, practically concedes that the judgment must be reversed."

In People v. Cox (Cal. App.), 226 Pac. 14, the court considered a conviction of several defendants for violation of the criminal syndicalism statute and affirmed the judgment as to several but reversed it as to defendant Mammi, stating with reference to that defendant:

"From the fact that the name Lauri Mammi appeared upon the papers to which we have referred, the jury doubtless assumed that the defendant Mammi was a member of the organization. This assumption may be in accordance with the facts, but assumption is not warranted in criminal cases. There must be proof of facts from which the jury may deduce or draw its conclusion and render its verdict. In other words the jury had no right to assume a fact even though such assumption is correct, in the absence of legal proof of such fact."

In People v. Erickson (Cal. App.), 226 Pac. 637, the court reversed a conviction for criminal syndicalism on the ground that neither the literature nor the oral testimony showed the nature of the organization and held that the I. W. W. was not an illegal organization per se. We quote from the opinion in that case.

[fol. 84] "The case at bar differs very materially from any of the former cases considered by this court, in that none of the literature advocating or suggesting forms of sabotage condemned by the statutes was introduced upon the trial of this action. It is only by conjecture or supposition that such a conclusion could be reached from any of the papers, pamphlets, or books presented to the jury as exhibits. The literature in question purports to set forth the purposes and principles of the I. W. W. and of how its aims and purposes are to be accomplished. This literature makes no express reference to direct action or any manner of violence whatever may be said of the visionary or impossible schemes set forth and contained therein.

We make this statement because, as said, in substance, in the case of People v. Thornton (Cal. App.), 219 Pac. 1020, every case of this kind must rest upon the character of the evidence introduced therein. The statute does not condemn or prescribe the I. W. W. as an illegal organization per se; hence, the mere fact of membership in such an organization does not, in and of itself, warrant the conclusion of belonging to an organization seeking to accomplish an industrial change by violence or unlawful means. In other words, the character of the organization is a question always to be determined."

In People v. Ware (Cal. App.), 226 Pac. 956, the court reversed a conviction for criminal syndicalism stating among other things in the opinion:

"It was the contention of the defendants at the trial that since the year 1918 the literature issued by the I. W. W. and the teachings of that organization have undergone a radical change, and that ever since that year violence and sabotage no longer have been taught or justified by that group of men. It was important, therefore, that the jury should be apprised of the principles, policies, aims, and purposes of the organization within the three-year period immediately preceding the filing of the indictment, and not be led [fol. 85] astray by hearsay evidence and incompetent conclusions based, in part at least, upon speeches, declarations and conversations

occurring prior to the time when, as the defendants claimed, the principles, purposes, and teachings of the organization were greatly modified."

Importance of California Cases

The California law was passed in 1919, a year before the enactment of the Kansas Law. It is similar in its terms to the Kansas law except that it goes further and provides that an organization teaching criminal syndicalism is an unlawful conspiracy and prohibits a continuing membership in such conspiracy. It is, therefore, of interest to note that even under such statute, circulation of the "preamble" and other literature not advocating violence in so many words, although advocating a new industrial and political system has been held to be insufficient to show the unlawful purposes in the organization.

The California courts in their early decisions, disposed of the constitutional questions (erroneously, we contend) and in the later cases the courts have dealt almost exclusively with questions of evidence, and have carved out and defined the terms used in connection with the different cases brought before them. This experience should be helpful to the courts of this and other states whose laws are of more recent enactment, and where the appealed cases have been few. Fiske is the first defendant in Kansas to raise a serious question as to the evidence against him. Other states have found that such case as his does not justify conviction and this court should do likewise in this case.

[fol. 86] The information and evidence show that defendant and his organization advocated industrial and political change; but did not advocate unlawful means for effecting such change.

The settled doctrine of the cases quoted here, as well as those cited in our brief, is that criminal syndicalism statutes do not prohibit the advocacy of industrial or political change, but do prohibit advocacy of unlawful means for accomplishing the same, no matter how beneficent the object; and that the purpose of the organization is an issue in every case. We submit that in this case the organization is clearly shown to advocate a wide-spread industrial and political change; but that there is nothing whatever in the information or evidence showing advocacy of unlawful means of effecting the same.

The "preamble" of the organization, and the testimony of the defendant are all the court and jury had before them concerning the purposes of the organization, and we quote the material parts of the same as set out in the opinion. The material part of the "preamble" is as follows:

"That the working class and the employing class have nothing in common, and that there can be no peace as long as hunger and want are found among millions of the working people and the few who make up the employing class have all the good things of life." And that, "Between these two classes a struggle must go on until the workers of the world organize a class, take possession of the earth, and the machinery of production and abolish the wage system."

And that "Instead of the conservative motto, 'A fair day's wages for a fair day's work,' we must inscribe on our banner the revolutionary watchword, 'Abolition of the wage system.' "
[fol. 87] "By organizing industrially we are forming the structure of the new society within the shell of the old."

The defendant testified as to his understanding of this language and the court quotes from his testimony on pages 6 and 7 of the opinion, as follows:

"I understand what the Industrial Workers of the World organization teaches. I understand that it teaches, advocates and states that the working class and the employing class have nothing in common and that there can be no peace so long as a few, who make up the employing class, have all the good things of life. I understand that between these two classes a struggle must go on until the workers of the world organize as a class, take possession of the earth and the machinery of production, and abolish the wage system. I understand that instead of the conservative motto 'A fair day's wages for a fair day's work' we must inscribe on our banner the revolutionary watchword 'abolition of the wage system.' I understand that by organizing industrially we are forming the structure of the new society within the shell of the old. We are organizing with industrial unions to take care of the labor situation in this country and in the world. That means that there won't be any capital, and that means that everybody—that one will be just as well off as the other fellow; at such time as it can be done; and means that everybody will work. That is what it means when it says 'By organizing industrially we are forming the structure of the new society within the shell of the old.' The new society will be a new organization—new control—control of industry. By 'in the shell of the old' I mean it will be forward, and instead of breaking up, we will not destroy anything, but we will build them. We will not take over property, but everybody will own property. This will be forced in economically. That is what I was teaching and suggesting when I took these applications. I didn't come right out and say that. The working class will enforce the [fol. 88] laws when they are organized sufficiently. The people of the earth will make the laws; we will all belong to the working class. * * * They came to me and asked me if I knew where there was an I. W. W. organizer, and I told them I was one and they asked me to explain it to them and I explained it to them. I explained the principles of the organization as far as I knew."

The quotation from the preamble above and the explanation of the defendant are all that we have in this case concerning the purposes of the organization; and there is nothing in either which can be said to violate the statute by advocating "crime, physical violence, arson, destruction of property, sabotage or other unlawful acts or methods as a means of accomplishing or effecting industrial or political ends or as a means of effecting industrial or political revolution or for profit."

Many cases in various states upholding convictions for criminal syndicalism and similar crimes are referred to extensively in our brief and in this motion; and we respectfully submit that in none of these cases was a conviction upheld, except where it was shown positively that the defendant directly advocated crime or violence. In this case defendant advocated industrial change in general terms, as in Ex parte Moore and People v. Erickson, supra. The preamble above quoted advocates industrial change but says nothing about violence. The Kansas Statute does not prohibit advocacy of industrial or political change—it penalizes advocacy of crime or violence to bring about such change. Nothing of the kind is proven in this case.

[fol. 89] The court should not take judicial notice of the purposes of the organization (Ex parte Campbell, — California, —, 221 Pac. 952), and there is nothing in the vast quantity of literature that was found on defendants showing any purposes not expressed in the preamble.

The act as applied in this case deprives appellant of the protection of the Constitution of the United States and of the State of Kansas.

In many cases concerning criminal syndicalism statutes which are cited in our brief herein, no statute has been upheld which prohibits the advocacy of industrial or political change by peaceful means and such statutes as have done so have been found to violate the state and federal constitutions (State v. Diamond, — N. M. —, 202 Pac. 988; State v. Gabriel, — N. J. —, 112 Atl. 611). In the only case of this kind which reached the Supreme Court of the United States, Fox v. Washington, 236 U. S. 273, 59 L. Ed. 573, that court in upholding the Washington Statute prohibiting the advocacy of breach of the law, carefully qualified its decision as follows:

"We understand the state court, by implication, at least, to have read the statute as confined to encouraging an actual breach of law. Therefore, the argument that this act is both an unjustifiable restriction of liberty, and too vague for a criminal law, must fail. It does not appear and is not likely that the statute will be construed to prevent publications, merely because they tend to produce unfavorable opinions of a particular statute or of law in general. In this present case, the disrespect for law that was encouraged was disregard of it—an overt breach and technically criminal act."

[fol. 90] In the case at bar, the defendant and the organization which he represented urged a change in the whole industrial and political scheme, but said nothing about the means by which this was to be accomplished—except that defendant testified that he personally understood it was to be done by peaceful means. We contend that the Kansas Statute does not prohibit such advocacy. But if the scope of the statute should be interpreted to prohibit all advocacy in changes in government and industry, the law is unconstitutional so far as it applies to peaceful advocacy under the decision cited above.

The interpretation placed upon this statute by the court deprives the defendant of his liberty without due process of law, and denies to him the equal protection of the law, all in violation of the Constitution of the United States, and especially to the Fourteenth Amendment thereto, which provides in part as follows:

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any state deprive any person of life liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

And the appellant specifically invokes the protection of the Constitution of the United States and of said amendment in this case.

[fols. 91 & 92] Conclusion

Waiving all minor points urged in our brief and decided adversely by this court we respectfully submit that the court should grant a rehearing in this case upon the two questions discussed above. This case was submitted without oral argument and appellant's brief probably did not emphasize the outstanding importance of these two questions. The right of every man to speak freely and to advocate changes in government by peaceful means is involved in this case. No other state has applied laws of this kind to advocacy of changes without violence. No harm has been done or could possibly be done by defendant so far as is shown by the evidence in this case, but a valuable right will be taken from him and from other citizens if the judgment of affirmants should stand.

Respectfully submitted, Charles L. Carroll, of Great Bend, Kansas; A. M. Harvey, Randal C. Harvey, Paul L. Harvey, of Topeka, Kansas, Attorneys for Appellant.

[fol. 93] In Supreme Court of Kansas

[Title omitted]

Order Overruling Petition for Rehearing—December 13, 1924

Now comes on for decision the motion for a rehearing of this cause; and thereupon it is ordered that said motion for a rehearing be overruled.

[fols. 94 & 95] IN SUPREME COURT OF KANSAS

[Title omitted]

CLERK'S CERTIFICATE

I, D. A. Valentine, Clerk of the Supreme Court of the State of Kansas, do hereby certify that the above and foregoing is a full true and complete Transcript of the Record and proceedings had in the above entitled cause, and also of the opinion of the court rendered thereon as the same appear on file and remain of record in my office.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Supreme Court at my office in the city of Topeka, this 13th day of February, A. D. 1925.

D. A. Valentine, Clerk of the Supreme Court of the State of Kansas. (Seal of Supreme Court State of Kansas.)

[fol. 96] [File endorsement omitted]

IN SUPREME COURT OF KANSAS

[Title omitted]

PETITION FOR AND ORDER ALLOWING WRIT OF ERROR—Filed Jan. 16, 1925

Considering himself aggrieved by the final decision of the Supreme Court of the State of Kansas in rendering judgment against him, and in affirming the judgment of the District Court of Rice County, Kansas, in the above entitled case, the appellant Harold B. Fiske hereby prays a writ of error, from the said decision and judgment, to the Supreme Court of the United States, and an order fixing the amount of a supersedeas bond.

Assignment of errors herewith.

Charles L. Carroll, A. M. Harvey, Randal C. Harvey, Paul L. Harvey, Attorneys for Appellant.

STATE OF KANSAS, ss:

SUPREME COURT

Let the writ of error issued upon the execution of a bond by the appellant Harold B. Fiske to the State of Kansas, in the sum of Four Hundred Dollars: such bond when approved to act as a supersedeas.

Dated this 17th day of January, 1925.

W. A. Johnston, Chief Justice Supreme Court of Kansas.

[fol. 97] [File endorsement omitted]

IN SUPREME COURT OF KANSAS

[Title omitted]

ASSIGNMENT OF ERRORS—Filed Jan. 16, 1925

The said appellant, Harold B. Fiske, with his petition for a writ of error, presents the following assignments of error in the rulings and decisions of the Supreme Court of the State of Kansas, in the above entitled cause:

Said Court erred in holding and deciding that the provisions of Chapter 37, Session Laws of Kansas, 1920, (being sections 21-301, 21-302, 21-303, and 21-304 of the Revised Statutes of Kansas, 1923), as applied to said appellant, were valid. The validity of said act was denied and drawn into question by the appellant on the ground of its being repugnant to the Constitution of the United States, and in contravention thereof.

The said errors are more particularly set forth as follows:

First. Said court erred in holding and deciding that said statute, insofar as it prohibits the advocacy of industrial or political change where no crime or violence or violation of law is advocated in the accomplishment thereof, and appellant's conviction thereunder, does not abridge the privileges and immunities of appellant, a citizen of the United States, and does not deprive the appellant of his liberty [fol. 98] without due process of law and does not deny to appellant the equal protection of the laws, in violation of the first clause of the Fourteenth Amendment to the Constitution of the United States, which provides:

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Second. Said court erred in holding and deciding that said statute, insofar as it prohibits the organization, helping to organize, or becoming a member of a society which teaches or advocates industrial or political change, where no crime or violence or violation of law is advocated in the accomplishment thereof, and appellant's conviction thereunder, does not abridge the privileges and immunities of appellant, a citizen of the United States, and does not deprive the appellant of his liberty without due process of law and does not deny to appellant the equal protection of the laws, in violation of the first clause of the Fourteenth Amendment to the Constitution of the United States quoted above.

Third. Said court erred in holding and deciding that said statute, as interpreted by said court, insofar as it prohibits the teaching and advocacy of industrial or political change by appellant by advocating and teaching:

"That the working class and the employing class have nothing in common, and that there can be no peace so long as hunger and want are found among millions of the working people, and the few who make up the employing class have all the good things of life," and that "Between these two classes a struggle must go on until the workers of the world organize a class, take possession of the earth, and the machinery of production and abolish the wage system," and that, "Instead of the conservative motto 'A fair day's wages for a fair day's work' we must inscribe on our banner the revolutionary watchword, 'Abolition of the wage system.' "

"By organizing industrially we are forming the structure of the new society within the shell of the old."

without advocating crime, physical violence, arson, destruction of [fol. 99] property, sabotage or other unlawful acts as a means of accomplishing such purposes, and appellant's conviction thereunder, does not abridge the privileges and immunities of appellant, a citizen of the United States, and does not deprive the appellant of his liberty without due process of law and does not deny to the appellant the equal protection of the laws, in violation of the first clause of the Fourteenth Amendment to the Constitution of the United Sates quoted above.

Fourth. Said court erred in holding and deciding that said statute, insofar as it prohibits the taking of applications for membership of certain persons in an organization teaching and advocating:

"That the working class and the employing class have nothing in common, and that there can be no peace so long as hunger and want are found among millions of the working people, and the few who make up the employing class have all the good things of life," and that "Between these two classes a struggle must go on until the workers of the world organize a class, take possession of the earth, and the machinery of production and abolish the wage system," and that, "Instead of the conservative motto 'A fair day's wages for a fair day's work we must inscribe on our banner the revolutionary watchword, 'Abolition of the wage system.' "

"By organizing industrially we are forming the structure of the new society within the shell of the old."

without advocating crime, physical violence, arson, destruction of property, sabotage or other unlawful acts as a means of accomplishing such purposes, and appellant's conviction thereunder, does not abridge the privileges and immunities of appellant, a citizen of the United States, and does not deprive the appellant of his liberty without due process of law and does not deny to the appellant the equal protection of the laws, in violation of the first clause of the Fourteenth Amendment to the Constitution of the United States above quoted.

Fifth. Said court erred in entering judgment affirming the judgment of the District Court of Rice County, Kansas, convicting the [fol. 100] appellant of a felony in violation of said statute for advocating political and industrial change as set out in the third assignment, and for taking applications for membership in a certain organization as set out in the fourth assignment, without advocating crime, physical violence, arson, destruction of property, sabotage or other unlawful acts as a means of accomplishing such purposes; and in denying appellant a rehearing therein, and in holding and deciding that such judgment, so affirmed, does not abridge the privileges and immunities of appellant, a citizen of the United States, and does not deprive the appellant of his liberty without due process of law, and does not deny to appellant the equal protection of the laws, in violation of the above quoted clause of the Fourteenth Amendment to the Constitution of the United States.

For which errors the appellant, Harold B. Fiske, prays that the said judgment of the Supreme Court of the State of Kansas, dated November 8th, 1924, be reversed and a judgment rendered and entered in favor of the appellant and for costs.

Charles L. Carroll, A. M. Harvey, Randal C. Harvey, Paul L. Harvey, Attorneys for Appellant, Harold B. Fiske.

[fol. 101] IN SUPREME COURT OF KANSAS

[Title omitted]

ORDER ALLOWING WRIT OF ERROR—January 17, 1925

Now comes the appellant by Randal Harvey its attorney and presents to the Hon. William A. Johnston, Chief Justice, an application for a Writ of Error to the United States Supreme Court; and thereupon after due consideration by the court it is ordered that said application be allowed upon the appellant giving a good and sufficient bond in the sum of $400 to be approved by this court.

[fol. 102] BOND ON WRIT OF ERROR FOR $400—Approved and filed Feb. 12, 1925; omitted in printing

[fol. 103] [File endorsement omitted]

IN SUPREME COURT OF KANSAS

WRIT OF ERROR—Filed Jan. 17, 1925

UNITED STATES OF AMERICA, ss:

The President of the United States of America to the Honorable the Judges of the Supreme Court of the State of Kansas, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Supreme Court of Kansas, before you, or some of you, being the highest court of law or equity of said State in which a decision could be had in the said suit between the State of Kansas, appellee, v. Harold B. Fiske, Appellant, wherein it was drawn in question the validity of a treaty or statute of, or an authority exercised under the United States, and the decision was against their validity; or wherein was drawn in question the validity of a statute of, or an authority exercised under, said State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of their validity; or wherein was drawn in question the construction of a clause of the Constitution, or of a treaty, or statute of, or commission held under, the United States, and the decision was against the title, right, privilege, or exemption specially set up or claimed under such clause of the said Constitution, treaty, statute, or commission; a manifest error hath happened, to the great damage of the said Harold B. Fiske, as by his complaint appears. We being willing that error, if any hath been, should be duly corrected, and [fol. 104] full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within 30 days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness the Honorable William Howard Taft, Chief Justice of the United States, the 17 day of January in the year of our Lord one thousand nine hundred and twenty-five.

F. L. Campbell, Clerk of the District Court of the United States, District of Kansas, by Nelle Clough, Deputy Clerk. (Seal of District Court, District of Kansas.)

Allowed Jan. 17th, 1925. W. A. Johnston, Chief Justice Supreme Court of Kansas.

[fols. 105 & 106] CITATION—In usual form showing service on Chas. B. Griffith; filed Jan. 17, 1925; omitted in printing

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[fol. 107] IN SUPREME COURT OF KANSAS

CERTIFICATE OF LODGMENT

I, D. A. Valentine, Clerk of the Supreme Court of the State of Kansas do hereby certify that there was lodged with me as such Clerk on January 17th, 1925, in the above entitled cause.—

1. The Original Bond for Appeal of which a copy is herein set forth, and,

2. Two copies of the Writ of Error as herein set forth, one for the appellee and one to file in my office.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Supreme Court of the State of Kansas, in the city of Topeka, this 13th day of February, A. D. 1925.

D. A. Valentine, Clerk of the Supreme Court of the State of Kansas. (Seal of Supreme Court, State of Kansas.)

[fol. 108] IN SUPREME COURT OF KANSAS

RETURN TO WRIT OF ERROR

In obedience to the commands of this writ, I herewith transmit to the Supreme Court of the United States a duly certified transcript of the complete record and the proceedings in the within entitled case together with all things concerning the same.

In witness whereof, I have hereunto subscribed my name and affixed the seal of said Supreme Court of Kansas, in the City of Topeka, this 13th day of February, A. D. 1925.

D. A. Valentine, Clerk of the Supreme Court of the State of Kansas. (Seal of Supreme Court, State of Kansas.)

Endorsed on cover: File No. 30,929. Kansas Supreme Court. Term No. 305. Harold B. Fiske, plaintiff in error, vs. The State of Kansas. Filed March 6th, 1925. File No. 30,929.

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WM. R. STANSBU
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No. 305. 48

In the Supreme Court of the United States

OCTOBER TERM 1925.

HAROLD B. FISKE, PLAINTIFF IN ERROR,

VS.

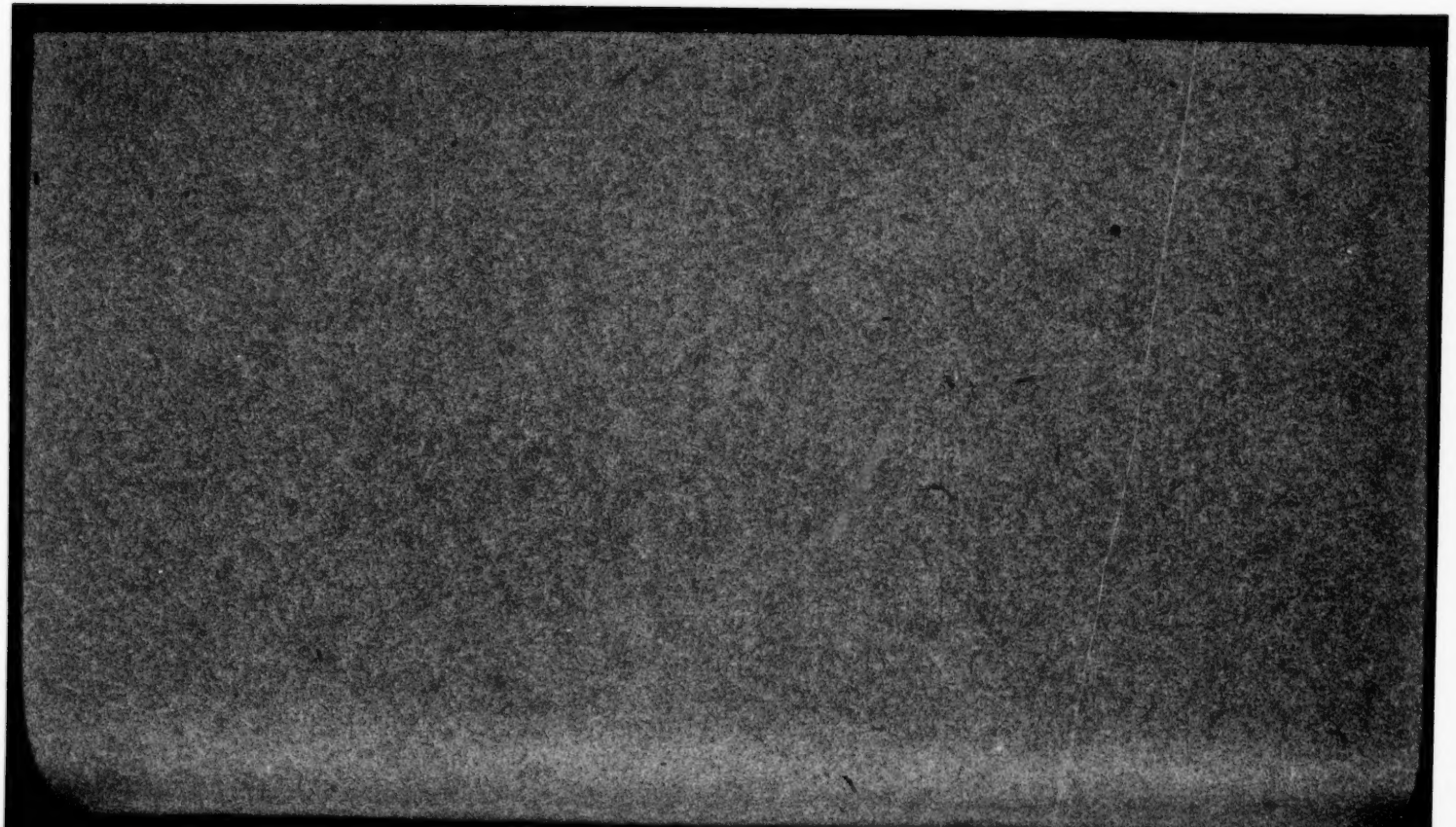
THE STATE OF KANSAS.

IN ERROR TO THE SUPREME COURT OF THE STATE OF KANSAS.

Filed March 6, 1925.
(30,929)

BRIEF FOR PLAINTIFF IN ERROR.

A. M. Harvey,
Randal C. Harvey,
of Topeka, Kansas,
Charles L. Carroll,
of Great Bend, Kansas,
Attorneys for Plaintiff in Error.



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In the Supreme Court of the United States

OCTOBER TERM 1925.

HAROLD B. FISKE, PLAINTIFF IN ERROR,

VS.

THE STATE OF KANSAS.

IN ERROR TO THE SUPREME COURT OF THE STATE OF KANSAS.

Filed March 6, 1925.
(30,929)

BRIEF FOR PLAINTIFF IN ERROR.

The opinion delivered in the courts below is reported in 117 Kansas, page 69.

STATEMENT OF JURISDICTIONAL GROUNDS.

The date of the judgment to be reviewed is November 8, 1924 (R. 36), petition for rehearing overruled December 13, 1924 (R. 48).

The specific claims advanced in the lower courts which are relied upon as the basis of this court's juris-

diction are that the statute under which plaintiff in error was convicted and his conviction thereunder are in contravention of the Constitution of the United States and particularly the Fourteenth Amendment (R. 35).

The rulings made in the lower court which are relied upon as the basis for this court's jurisdiction are that such statute and conviction do not violate such constitutional provisions (R. 41).

Cases believed to sustain the jurisdiction are *Hill* v. *Smith*, 260 U. S. 592.

Statement of the Case.

The plaintiff in error, Harold B. Fiske, was convicted in the District Court of Rice County, Kansas, of a violation of the Kansas Criminal Syndicalism Law, which is set out in full in the appendix to this brief.

Fiske was a member and delegate of the Industrial Workers of the World and its agricultural branch, and came to Kansas from Oklahoma about June 30, 1923, and on the same day was arrested at Geneseo, Kansas, in Rice County (R. 10, 21). He was taken to the city jail by the marshal and questioned and searched by the sheriff, marshal and others called in (R. 10, 18, 19). He admitted that he was an organizer for the I. W. W. and that he had taken the applications of two or three members on that day (R. 10, 18, 19) and had read them the "preamble" of his organization (R. 23). A search of his person revealed a discharge from the army and a considerable quantity of I. W. W. literature (described in this brief R. 12-15), and prosecution was commenced against him under the Kansas Criminal Syndicalism Act (See Appendix).

An information was filed in the District Court of Rice County on September 4, 1923, which is as follows:

"Comes now L. E. Quinlan, the undersigned, county attorney of Rice County, Kansas, and in the name of, by the authority of and on behalf of the State of Kansas, gives this court to understand and be informed that on or about the 2nd day of July, 1923, and in the County of Rice and State of Kansas, one Harold B. Fiske then and there being did then and there unlawfully, feloniously and wilfully, by word of mouth and by publicly displaying and circulating certain books and pamphlets and written and printed matter, advocate, affirmatively suggest and teach the duty, necessity, propriety and expediency of crime, criminal syndicalism and sabotage by then and there unlawfully, wilfully, knowingly, and feloniously persuading, inducing and securing Henry Lang, Earl Summers, and George Kelley to sign an application for membership in a society known as the Agricultural Workers Industrial Union No. 110 and by issuing to the said Henry Lang, Earl Summers and George Kelley membership cards, commonly known as the Red Card, in said Agriculture Workers Industrial Union No. 110, which said Agriculture Workers Industrial Union No. 110 is a branch of and component part of the Industrial Workers of the World organization, said defendant then and there knowing that said organization, unlawfully teaches, advocates and affirmatively suggests:

'That the working class and the employing class have nothing in common, and that there can be no peace so long as hunger and want are found among millions of the working people and the few who make up the employing class, have all the good things of life.' And that, 'Between these two classes a struggle must go on until the workers of the world organize a class, take possession of the earth, and the machinery of production and abolish

the wage system.' And that: 'Instead of the conservative motto, "A fair days wages for a fair day's work" we must inscribe on our banner the revolutionary watchword, "Abolition of the wage system." '

'By organizing industrially we are forming the structure of the new society within the shell of the old.'

All contrary to and in violation of Chapter 36 of the Laws of Kansas for the year 1920.

L. E. Quinlan" (R. 7-8).

On September 14, 1923, the plaintiff in error was put on trial under this information and found guilty, and sentenced to a term of one to ten years in the state penitentiary (R. 2-3). After the overruling of motion for new trial (R. 48), plaintiff in error appealed to the Supreme Court of the state, which affirmed the judgment in its opinion handed down November 8, 1924 (R. 36-41). Petition for rehearing was filed on November 25, 1924 (R. 41-48), and overruled on December 13, 1924 (R. 48), and writ of error sued out to this court (R. 53).

The evidence against defendant consisted entirely of the statements made by him to the officers questioning him and the literature found upon his person (R. 9-21). Fiske's statements disclosed that he was a member and organizer for the I. W. W., and that he had secured two or three members since coming into the state, which was confirmed by his credentials, and the membership cards found upon his person (R. 10, 12, 14). The literature contained nothing as to the aims and purposes of the organization except the "preamble" of the organization which is partially quoted in the information, and which is in full as follows (R. 15):

"The working class and the employing class have nothing in common. There can be no peace so long as hunger and want are found among millions of the working people and the few, who make up the employing class, have all the good things of life. Between these two classes a struggle must go on until the workers of the world organize as a class, take possession of the earth and the machinery of production, and abolish the wage system.

We find that the centering of the management of industries into fewer and fewer hands makes the trade unions unable to cope with the ever growing power of the employing class. The trade unions foster a state of affairs which allows one set of workers to be pitted against another set of workers in the same industry, thereby helping defeat one another in wage wars. Moreover, the trade unions aid the employing class to mislead the workers into the belief that the working class have interests in common with their employers.

These conditions can be changed and the interest of the working class upheld by an organization formed in such a way that all its members in any one industry, or in all industries, if necessary, cease work whenever a strike or lockout is on in any department thereof, thus making an injury to one an injury to all.

Instead of the conservative motto, 'A fair day's wage for a fair day's work,' we must inscribe on our banner the revolutionary watchword, 'Abolition of the wage system.'

It is the historic mission of the working class to do away with capitalism. The army of production must be organized not only for the everyday struggle with capitalists, but also to carry on production when capitalism shall have been overthrown. By organizing industrially we are forming the structure of the new society within the shell of the old."

The preamble quoted above and defendant's testimony (R. 21-27) are conceded by the Supreme Court of the state to be the only evidence which throw light on the purposes or teachings of the organization (R. 39-40).

In the lower court it was contended by the plaintiff in error that, since neither Fiske nor his organization was shown to have urged change in government or industry by criminal or unlawful means, the statute in question (if held applicable) and his conviction thereunder, were in violation of the Fourteenth Amendment to the Constitution of the United States (R. 35), which contention was rejected by the Supreme Court of Kansas (R. 41).

SPECIFICATIONS OF ERROR.

(R. 50-52).

Said court erred in holding and deciding that the provisions of Chapter 37, Session Laws of Kansas, 1920, (being sections 21-301, 21-302, 21-303, and 21-304 of the Revised Statutes of Kansas, 1923), as applied to said appellant, were valid. The validity of said act was denied and drawn into question by the appellant on the ground of its being repugnant to the Constitution of the United States and in contravention thereof.

The said errors are more particularly set forth as follows:

First. Said court erred in holding and deciding that said statute insofar as it prohibits the advocacy of industrial or political change where no crime or violence or violation of law is advocated in the accomplishment thereof, and appellant's conviction thereunder, does not abridge the privileges and immunities of appellant, a citizen of the United States, and does not deprive the appellant of his liberty without due process of law and does not deny to appellant the equal protection of the laws, in violation of the first clause of the Fourteenth Amendment to the Constitution of the United States, which provides:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor

shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws" (R. 50).

Second. Said court erred in holding and deciding that said statute, insofar as it prohibits the organization, helping to organize or becoming a member of a society which teaches or advocates industrial or political change, where no crime or violence or violation of law is advocated in the accomplishment thereof, and appellant's conviction thereunder, does not abridge the privileges and immunties of appellant, a citizen of the United States, and does not deprive the appellant of his liberty without due process of law and does not deny to appellant the equal protection of the laws, in violation of the first clause of the Fourteenth Amendment to the Constitution of the United States quoted above (R. 50).

Third. Said court erred in holding and deciding that said statute as interpreted by said court, insofar as it prohibits the teaching and advocacy of industrial or political change by appellant by advocating and teaching:

> "That the working class and the employing class have nothing in common, and that there can be no peace so long as hunger and want are found among millions of the working people, and the few who make up the employing class have all the good things of life," and that "Between these two classes a struggle must go on until the workers of the world organize a class, take possession of the earth, and the machinery of production and abolish the wage system," and that "Instead of the conservative motto 'A fair day's wages for a fair

> day's work' we must inscribe on our banner the revolutionary watchword, 'Abolition of the wage system.'"
>
> "By organizing industrially we are forming the structure of the new society within the shell of the old."

without advocating crime, physical violence, arson, destruction of property, sabotage, or other unlawful acts as a means of accomplishing such purposes, and appellant's conviction thereunder, does not abridge the privileges and immunities of appellant, a citizen of the United States, and does not deprive the appellant of his liberty without due process of law and does not deny to the appellant the equal protection of the laws, in violation of the first clause of the Fourteenth Amendment to the Constitution of the United States quoted above (R. 51).

Fourth. Said court erred in holding and deciding that said statute, insofar as it prohibits the taking of applications for membership of certain persons in an organization teaching and advocating:

> "That the working class and the employing class have nothing in common, and that there can be no peace so long as hunger and want are found among millions of the working people, and the few who make up the employing class have all the good things of life," and that "Between these two classes a struggle must go on until the workers of the world organize a class, take possession of the earth, and the machinery of production and abolish the wage system," and that, "Instead of the conservative motto 'A fair day's wages for a fair day's work' we must inscribe on our banner the revolutionary watchword, 'Abolition of the wage system.'"

> "By organizing industrially we are forming the structure of the new society within the shell of the old."

without advocating crime, physical violence, arson, destruction of property, sabotage or other unlawful acts as a means of accomplishing such purposes, and appellant's conviction thereunder, does not abridge the privileges and immunities of appellant, a citizen of the United States, and does not deprive the appellant of his liberty without due process of law and does not deny to the appellant the equal protection of the laws, in violation of the first clause of the Fourteenth Amendment to the Constitution of the United States above quoted (R. 51).

Fifth. Said court erred in entering judgment affirming the judgment of the District Court of Rice County, Kansas, convicting the appellant of a felony in violation of said statute for advocating political and industrial change as set out in the third assignment, and for taking applications for membership in a certain organization as set out in the fourth assignment, without advocating crime, physical violence, arson, destruction of property, sabotage or other ulawful acts as a means of accomplishing such purposes; and in denying appellant a rehearing therein, and in holding and deciding that such judgment, so affirmed, does not abridge the privileges and immunities of appellant, a citizen of the United States, and does not deprive the appellant of his liberty without due process of law, and does not deny to appellant the equal protection of the laws, in violation of the above quoted clause of the Fourteenth Amendment to the Constitution of the United States (R. 52).

ARGUMENT.

The "Preamble" of the I. W. W. does not advocate crime or violence.

The only evidence showing what Fiske taught or advocated is the so-called "preamble" of the I. W. W. and his own testimony concerning it. The state court has properly held that the jury were at liberty to disregard the testimony of plaintiff in error if they did not believe it. His testimony was that he did not advocate crime or violence and that his organization did not (R. 22-23). The conviction must, therefore, rest entirely upon the language of this "preamble." Likewise, the teachings of the organization of which Fiske was a delegate are not shown in any other way than by the language of this "preamble." The information in the case selected sentences out of the preamble as constituting the teachings alleged to be unlawful (R. 7-8), and the entire charge, therefore, is dependent upon the nature of the language there used or the selected parts.

There is nothing in the preamble of the I. W. W. as set out in the information which says anything about crime, physical violence, arson, destruction of property, sabotage or other unlawful acts.

The preamble says that the working and employing class have nothing in common (R. 15). Whether we agree with it or not, this does not indicate crime or violence. It says there can be no peace as long as hunger and want are found among the working people

(R. 15). That is a statement of opinion, not advocacy of crime. The preamble says a struggle must go on until the workers organize a class, take possession of the earth, and the machinery of production and abolish the wage system (R. 15). There is not a word there which indicates that is to be done by violence rather than by some constitutional method. It is not a crime to advocate the abolition of the wage system, and this does not necessarily involve violence. Many employers have voluntarily abolished or modified the wage system and substituted profit-sharing arrangements in its stead. They have committed no crime and are advocating none.

The preamble again attacks the wage system and concludes "By organizing industrially we are forming the structure of the new society within the shell of the old" (R. 15). All doubt as to the meaning of the previous words of the preamble are resolved by this last sentence. Whatever the merits of the plan may be, this last sentence indicates a constructive purpose to organize peacefully a new society to be ready to take the place of the old one, which the organization believes must fall. Nowhere in the preamble nor, for that matter, in any of the literature in evidence in this case, is it indicated how the organization proposes to accomplish its ends except the constructive plan of being ready to replace our present institutions if they do fall.

In disposing of this question, the Supreme Court of Kansas said:

"The language quoted from the I. W. W. preamble need not—in order to sustain the judgment—be held necessarily and as a matter of law to advocate, teach or even affirmatively suggest physical violence as a means of accomplishing industrial or political ends. It is open to that interpretation and is capable of use to convey that meaning. The construction to be placed upon it in the connection in which it was employed was submitted as an issue of fact by an instruction that no conviction could be had unless from the evidence and beyond a reasonable doubt the jury were satisfied (among other things) that the organization commonly called the I. W. W. is one that teaches criminal syndicalism as defined in the statute. The jury were not required to accept the defendant's testimony as a candid and accurate statement. There was room for them to find, as their verdict show they did, that the equivocal language of the preamble and of the defendant in explaining it to his prospects was employed to convey and did convey the sinister meaning attributed to it by the state" (R. 40).

We conceive that this is an admission by that court that the language quoted does not "advocate, teach or even affirmatively suggest physical violence as a means of accomplishing industrial or political ends." It may be "open to that interpretation" as the court suggests, but constitutional guarantees certainly protect against conviction of a felony simply because the language used may be open to some insidious interpretation not expressed, and it has been so held by the courts of nearly all of the states.

In the case of *In re: Moore,* 38 Idaho. 506, the Supreme Court of that state had before it the exact preamble in question in this case, together with a

quantity of other literature referring to "the strike on the job." The action was one of habeas corpus before trial, and the ocurt held that the petitioner must be discharged for the reason that the evidence at the preliminary examination (including the preamble and other literature) did not show that the organization proposed to accomplish its ends by unlawful means. In the opinion in this case the court did not discuss the preamble as open to the possible construction of urging violence or crime, and after a careful review of the other literature, found that it did not show the unlawful nature of the organization and ordered the petitioner discharged.

In the case of *People* v. *Flannagan*, 65 Cal. App. 268, the court reversed a conviction for criminal syndicalism on account of the admission of improper and prejudicial evidence concerning the ultimate object to be acomplished by the organization in question, holding that the courts were not concerned with the object, but only with the means of accomplishing the same. In the opinion in that case the court said:

> "The defendants were not on trial for their or other conspirators' moral or religious beliefs, or for the character of the industrial and political scheme which the organization proposes to establish, but for the unlawful means to be advocated and employed by the conspiracy in effecting its ultimate object. However beneficent that object may be, the conspiracy is criminal if it advocates the accomplishment thereof by 'unlawful acts of force and violence or unlawful methods of terrorism,' and however baneful the ultimate object, the law does not make criminal the advocacy thereof if peaceful means only, such as are sanctioned by

> our constitution and laws, are employed. The admission of the foregoing evidence was error. It was proper for the prosecution to prove that the organization proposes to accomplish an industrial and political change, but such purpose is shown by practically every piece of I. W. W. literature admitted in evidence, and no member or witness has ever denied that the organization advocates making a change. The character of the system to be established is immaterial in the trial of a case arising under the act."

From the above cases, as well as the decision of the state court in the case at bar, it is clear that the language of the preamble does not teach or advocate the necessity or propriety of crime or any other unlawful acts in the accomplishment of the purposes set out.

Courts cannot take judicial notice of the unlawful character of the organization.

As above stated, there is no evidence in this case to show that the organization in question or the plaintiff in error taught or advocated crime or criminal syndicalism as a means to the ends sought by them. It is true that in some cases dealing with the same organization there has been proof of the advocacy of such unlawful means, and in those cases (where no error was found) convictions have been affirmed, but it has been uniformly held by the courts of the states having anti-syndicalism laws, that such evidence in other cases does not justify a court in taking jurisdictional notice of the criminal character of the I. W. W., or in presuming anything against the organization or its members in the absence of proof in each specific case.

In *In re Campbell,* 64 Cal. App. 300, the court held invalid a city ordinance prohibiting the publication of literature of the Industrial Workers of the World, as a discrimination against that organization, saying in the opinion:

> "We do not judicially know, nor is it within the province of any judicial tribunal, whether of trial or appellate jurisdiction, so to know, what the specific nature of the principles or doctrines or propaganda of the I. W. W. organization is; but if it may be assumed that those principles or doctrines or propaganda in and of themselves have at some time been pernicious in their effect or opposed to the well being of society or of mankind, still there is no presumption that they will always remain so, or that the said organization has not so changed, modified or amended them as to make them accord with a proper understanding of the rights guaranteed by our constitutions to every citizen of this country. This court, however, in the past has had occasion to review and learn something of the alleged principles of the I. W. W. organization in cases involving the prosecution and conviction of certain members of said organization under the State Syndicalism Act, St. 1919, p. 281 (*People* v. *Roe,* 58 Cal. App. 690, 209 Pac. 381; *People* v. *Wismer,* 58 Cal. App. 679, 209 Pac. 259; *People* v. *La Rue, et al.,* (Cal. App.) 216 Pac. 627); and, while it is true that those principles disclosed that said organization and the members thereof entertained and stood for a paradoxical and singularly drastic notion of what a system for the government of the peoples of the earth should be—a notion which there is every reason to believe is far beyond any hope of practical attainment—we cannot say that the mere teaching or advocacy of that system is beyond the pale of the constitutional right of any citizen guaranteed to all citizens or organization of citizens to advocate

any change in our system of government or any principles antagonistic to our present system of government by peaceful methods. Thus it is to be observed that, even if the system proposed to be substituted for our present system of government by the said organization is the same now as it was at the time of the trial and hearing of the cases above referred to, there is nothing in the scheme itself which is inherently wrong or indicative of any criminal purpose in the organization or its members in advocating and teaching the same. But in the Roe and other like cases there was evidence which showed, or sufficiently tended to show to support the conviction, that the members of said organization habitually taught and advocated the carrying out of its principles by criminal means of the most atrocious character, and, as said in that case, this was the fundamental vice of the system advocated by said organization, and which justly subjected its members to prosecution and punishment."

In *People* v. *Ware*, 67 Cal. App. 81, the court reversed a conviction for criminal syndicalism, stating, among other things, in the opinion:

"It was the contention of the defendants at the trial that since the year 1918 the literature issued by the I. W. W. and the teachings of that organization have undergone a radical change, and that ever since that year violence and sabotage no longer have been taught or justified by that group of men. It was important, therefore, that the jury should be apprised of the principles, policies, aims, and purposes of the organization within the three-year period immediately preceding the filing of the indictment, and not be led astray by hearsay evidence and incompetent conclusions based, in part at least, upon speeches, declarations and conversations occurring prior to the time when, as the defendants claimed, the principles, purposes, and

teachings of the organization were greatly modified."

In *People* v. *Erickson*, 66 Cal. App. 307, the court reversed a conviction for criminal syndicalism on the ground that neither the literature nor the oral testimony showed the nature of the organization and held that the I. W. W. was not an illegal organization *per se*. We quote from the opinion in that case.

> "The case at bar differs very materially from any of the former cases considered by this court, in that none of the literature advocating or suggesting forms of sabotage condemned by the statutes was introduced upon the trial of this action. It is only by conjecture or supposition that such a conclusion could be reached from any of the papers, pamphlets, or books presented to the jury as exhibits. The literature in question purports to set forth the purposes and principles of the I. W. W. and of how its aims and purposes are to be accomplished. This literature makes no express reference to direct action or any manner of violence whatever may be said of the visionary or impossible schemes set forth and contained therein.
>
> We make this statement because, as said, in substance, in the case of *People* v. *Thornton*, (Cal. App.) 219 Pac. 1020, every case of this kind must rest upon the character of the evidence introduced therein. The statute does not condemn or prescribe the I. W. W. as an illegal organization *per se;* hence, the mere fact of membership in such an organization does not, in and of itself, warrant the conclusion of belonging to an organization seeking to accomplish an industrial change by violence or unlawful means. In other words, the character of the organization is a question always to be determined."

In *People* v. *Lloyd*, 304 Ill. 23, the Supreme Court of that state, in affirming a conviction under the Illinois statute, carefully qualified its opinion by the following language:

> "We do not wish to be understood as approving the principle of 'guilt by association,' because it is not in harmony with American ideals. A fundamental principle of American jurisprudence is that 'guilt is personal.' Individuals ought not to be condemned for mere membership in organizations, nor should they be held to believe in, advocate and work to accomplish every word, sentence or plank in their party platforms, because it is general knowledge that the greater part of the individuals, even the most intelligent, belonging to the Republican or Democratic parties, do not read carefully all of their party platforms, and that many of those who do read them do not agree with each and every party pronouncement. There must be proof of conscious guilt by individual action before it can be said that the individual adopts and approves the language of the party platform. This proof is clearly present in the instant case. Every plaintiff in error took an active part in the organization and advancement of the cause of the Communist Labor Party. They explained and enlarged the meaning of the party platform and program by other writings and activities."

The construction of the statute by the Supreme Court of Kansas is binding upon this court.

The Kansas Criminal Syndicalism Act does not differ essentially from those of other states which have been upheld as against constitutional objections. The statute itself provides only for the punishment of those who advocate industrial or political change by

violent or criminal means. The rule of law that a statute should be construed so as not to violate the constitution, would be applicable were it not for the actual construction of this statute by the highest court of the state in this case, as follows: "The language quoted from the I. W. W. preamble need not—in order to sustain the judgment—be held necessarily, and as a matter of law, to advocate, teach or affirmatively suggest physical violence as a means of accomplishing industrial or political ends."

Although this construction is out of harmony with that placed upon similar acts by courts of other states, and by this court it is controlling as to the Kansas law in this case.

In the case of *Wolff Packing Company* v. *Court of Industrial Relations*, 267 U. S. 552. This court (referring to another Kansas statute) said:

> "The Supreme Court's construction of the operation and effect of the act is controlling. The language quoted shows how drastic and all-inclusive it is."

The statute under which plaintiff in error was convicted, as construed by the Suprme Court, and the conviction of Fiske thereunder, violates his constitutional rights.

In the many cases, in which convictions have been upheld by the state and federal courts for violations of similar laws, the facts have always shown a direct advocacy of crime or violence or law violation.

Schenck v. *United States*, 249 U. S. 47, 63 L. Ed. 470.

Frohwerk v. *United States*, 249 U. S. 204, 63 L. Ed. 561.
Debs v. *United States*, 249 U. S. 211, 63 L. Ed. 566.
Abrams v. *United States*, 250 U. S. 616, 63 L. Ed. 1173.
Gilbert v. *Minnesota*, 254 U. S. 325, 65 L. Ed. 287.
State v. *Fox*, 71 Wash. 185, 127 Pac. 111, affirmed 236 U. S. 273.
State v. *Quinlan*, 86 N. J. L. 120, 91 Atl. 111.
State v. *Moilen, et al.*, ... Min. ...., 167 N. W. 345, 1 A. L. R. 331.
Ex Parte McDermott, 180 Cal. 783, 183 Pac. 437.
People v. *Malley*, ... Cal. App. ...., 194 Pac. 48.
State v. *Hennessy*, 114 Wash. 351, 195 Pac. 211.
State v. *Workers Socialist Publishing Co., et al.*, ... Minn. ...., 185 N. W. 931.
People v. *Steelik*, ... Cal. ...., 203 Pac. 78.
People v. *Taylor*, ... Cal. ...., 203 Pac. 85.
People v. *Gitlow*, 234 N. Y. 132, affirmed ..... U. S. ....., 45 Sup. Ct. Rep. 675, decided June 8, 1925.
People v. *Lloyd*, 304 Ill. 23, 136 N. E. 505.

In the above cases the various defendants advocated resistance to the government, violation of the draft act, arson, dynamiting, murder, destruction of property and sabotage, mass strikes and intimidation—as a means of accomplishing political or industrial change, and the defendants were properly convicted under constitutional laws. The plaintiff in error in the case at bar advocated none of these things except the change itself, and none of the cases cited are authority for his conviction.

While statutes similar to this have been held constitutional by the court, so long as they prohibit only the advocacy of political or industrial change by violent means, they have been uniformly held invalid whenever they overstepped that line and penalized the advocacy of change without violence. This court in the pioneer case of *Fox* v. *State of Washington*, 236 U. S. 273, clearly indicated the distinction, which has since been followed, in the following language:

> "We understand the state court, by implication, at least, to have read the statute as confined to encouraging an actual breach of law. Therefore, the argument that this act is both an unjustifiable restriction of liberty, and too vague for a criminal law, must fail. It does not appear and is not likely that the statute will be construed to prevent publications, merely because they tend to produce unfavorable opinions of a particular statute or of law in general. In this present case, the disrespect for law that was encouraged was disregard of it—an overt breach and technically criminal act."

In *State* v. *Diamond*, 27 N. Mex. 477, the Supreme Court of that state held unconstitutional its statute which provided:

> "It shall be unlawful for any person or persons, firm or corporation, to commit or perform or to cause to permit or to be performed any act of any kind whatever which has for its purpose and aim the destruction of organized government, federal, state or municipal, or to do or cause to be done any act which is antagonistic to or in opposition to such organized government, or incite or attempt to incite revolution or opposition to such organized government * * * (Sec. 1).

> "It shall be unlawful for any person or persons, firm or corporation to advocate or teach, or cause to be advocated or taught, in any manner whatsoever, the doing or performance of any of the acts prohibited by Sec. 1 hereof" (Sec. 2).

Defendant in the *Diamond* case was charged with attempting to incite revolution and opposition to the Government of the United States by soliciting members for the Industrial Workers of the World. The court reversed the judgment of conviction, saying:

> "In the American mind the word 'revolution,' at first view, is associated with the war for independence by the colonies, which was, of course, a rebellion and a revolution accomplished by force of arms. But this cannot be said to be the ordinary meaning of the word in all cases. The promulgation and adoption of the Constitution of the United States was a revolution of far-reaching importance. * * * The word 'revolution' is directly associated with the words 'opposition to such organized governments,' and must be held to include the same thing. A fair, general view of the whole statute leads to the conclusion that it was designed to close the mouths and tie the hands of the people who were dissatisfied with the government as at present constituted, and who advocated by any means, peaceful or otherwise, change in the form of government, or the abandonment of organized government entirely. This act was passed after the Armistice, and before the conclusion of peace with Germany, which has been accomplished only within the last few days. But the act is not a war measure, and none of the considerations which apply to conduct which constitutes a proximate and imminent danger to the government in the time of war, or danger to the success of its arms against the public enemy, apply here. See *Schenck* v. *United*

> *States* * * * where the distinction is pointed out that time and circumstances may be determinative as to whether a statute limiting the right of free speech will be valid."

In *State* v. *Gabriel*, 95 N. J. 337, 112 Atl. 611, the court held the portion of the New Jersey statute providing:

> "Any person who shall become a member of any organization society or order organized or formed, or attend any meeting, or counsel or solicit others so to do, for the purpose of inciting, abetting, promoting or encouraging hostility or opposition to the Government of the United States, or of the State of New Jersey, or who in any manner shall aid, abet or encourage any such organization, society or order or meeting in the propagation or advocacy of such a purpose, shall be guilty of a high misdemeanor."

to be unconstitutional so far as it includes hostility or opposition unless there is a purpose to overthrow or subvert the government by force. Held that as long as the organization confines itself to peaceful hostility, it is lawful.

The latest expression of this court in the case of *Gitlow* v. *People of the State of New York*, 268 U. S. 652, 45 Sup Ct. Rep. 625, decided June 8, 1925, is in harmony with the previous decisions of this court and those of other states (with the exception of Kansas). In the *Gitlow* case this court carefully analyzes a long document circulated by Gitlow and upholds the conviction only because some parts of this "Manifesto" teach and advocate the necessity of unlawful acts—mass strikes—usurping the functions of municipal government, etc.

The "preamble" in question in this case urges no such means. It urges nothing except organization for the purpose of avoiding the common error of one group of laboring men striking against the other. It contains some idle prophesies about the distingeration of our form of government and states that "by organizing industrially we are forming the structure of the new society within the shell of the old."

The plaintiff in error advocated nothing that is not contained in this preamble and the state court has held that the statute prohibits such teaching. The statute with this construction falls into the class of the New Mexico statute (*State* v. *Diamond, supra*) which prohibited advocacy of political or industrial change or revolution without specifying the means by which this is to be accomplished, and is therefore unconstitutional.

Quoting from the case of *Gitlow* v. *New York, supra*, this court, after a discussion of the law questions involved, sums up the case in the following language:

> "It was not necessary, within the meaning of the statute, that the defendant should have advocated 'some definite or immediate act or acts' of force, violence or unlawfulness. It was sufficient if such acts were advocated in general terms; and it was not essential that their immediate execution should have been advocated.

The distinction between the *Gitlow* case and the case at bar is that Gitlow advocated violence and unlawful means for bringing about political and industrial change; and although this advocacy was in general

terms and referred to no specific act, it was necessarily held to be sufficient to deprive him of the constitutional protection of liberty of speech. In the case at bar the plaintiff in error advocated nothing unlawful, directly or indirectly, specifically or generally, immediately or remotely. He advocated political and industrial change, it is true, but he proposes no means to bring these changes about, except by industrial organization, and this court has upheld the right to organize so many times that it would be superfluous to cite authorities.

The only reference to strikes in the case at bar is the following resolution:

> "Resolved, that no members in the harvest field call a strike in any locality or on any threshing machine unless they are working and drawing pay from said machine" (R. 13).

which is a more conservative rule than prevails in many labor unions.

Statutes of this nature, in derogation of the liberty of an individual to speak freely his sentiments on all subjects, have become increasingly common in the last few years. They have been upheld whenever the prohibition is against the inciting of unlawful acts, but whenever their scope has extended beyond constitutional limits, the courts have intervened. The Kansas statute, which might seem valid upon its face, has been so construed by the highest court of the state as to prohibit the advocacy of change in government or industry in general terms; by permitting the jury to look for sinister meaning beneath the actual words,

uttered or printed. It cannot be contended, however, that these words of the preamble had anything but their usual and ordinary meaning when uttered or displayed by Fiske to the applicants for membership, and his guilt cannot be hinged upon the presumption that he meant something different than he said, for in such case no person would be safe from the consequences of misapprehension of words spoken by him.

We assume from the decision in *Gitlow* v. *New York, supra,* and former decisions of this court, that freedom of speech and of the press are among the fundamental personal rights and liberties protected by the due process clause of the Fourteenth Amendment from impairment by the states, and have therefore not discussed this question at length.

This liberty has been infringed by the conviction of Fiske under the Kansas Criminal Syndicalism Act as construed by the highest court of the state and the case should, accordingly, be reversed.

Respectfully submitted,

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Attorneys for Plaintiff in Error.

APPENDIX I.

The Kansas Criminal Syndicalism Act (Chapter 37, Session Laws of Kansas, 1920; being Sections 21-301, 21-302, 21-303 and 21-304, Revised Statutes of 1923).

Section 1. "Criminal Syndicalism" is hereby defined to be the doctrine which advocates crime, physical violence, arson, destruction of property, sabotage, or other unlawful acts or methods, as a means of accomplishing or effecting industrial or political ends, or as a means of effecting industrial or political revolution, or for profit (Sec. 21-301).

Section 2. "Sabotage" is hereby defined to be malicious, felonious, intentional or unlawful damage, injury or destruction of real or personal property of any employer, or owner, by his or her employee or employees, or any employer or employers or by any person or persons, at their own instance, or at the instance, request or instigation of such employees, employers, or any other person (Sec. 21-302).

Section 3. Any person who, by word of mouth, or writing, advocates, affirmatively suggests or teaches the duty, necessity, propriety or expediency of crime, criminal syndicalism, or sabotage, or who shall advocate, affirmatively suggest or teach the duty, necessity, propriety or expediency of doing any act of violence, the destruction of or damage to any property, the bodily injury to any person or persons, or the

commission of any crime or unlawful act as a means of accomplishing or effecting any industrial or political ends, change or revolution, or for profit; or who prints, publishes, edits, issues, or knowingly circulates, sells, distributes, or publicly displays any books, pamphlets, paper, handbill, poster, document, or written or printed matter in any form whatsoever, containing matter advocating, advising, affirmatively suggesting or teaching, crime, criminal syndicalism, sabotage, the doing of any act of physical violence, the destruction of or damage to any property, the injury to any person, or the commission of any crime or unlawful act as a means of accomplishing, effecting, or bringing about any industrial or political ends or change, or as a means of accomplishing, effecting or bringing about any industrial or political revolution, or for profit, or who shall openly, or at all attempt to justify by word of mouth or writing the commission or the attempt to commit sabotage or any act of physical violence, or the destruction of or damage to any property, or the injury of any person or the commission of any crime, or unlawful act, with the intent to exemplify, spread or teach, or affirmatively suggest criminal syndicalism, or organizes, or helps to organize or become a member of, or voluntarily assembles with any society or assemblage of persons which teaches, advocates or affirmatively suggests the doctrine of criminal syndicalism, sabotage, or the necessity, propriety or expediency of doing any act of physical violence or the commission of any crime or unlawful act as a means of accomplishing or effecting any industrial or political

ends, change or revolution, or for profit, is guilty of a felony, and upon conviction thereof shall be punished by imprisonment in the state penitentiary for a term of not less than one year nor more than ten years, or by a fine of not more than $1,000, or by both such imprisonment and fine (Sec. 21-303).

Section 4. The owner, lessee, agent, superintendent, or person in charge or occupation of any place, building, room or rooms, or structure, who knowingly permits therein any assembly or consort of persons prohibited by the provisions of Section 3 of this act, or who after notification by authorized public or peace officer that the place or premises, or any part thereof, is or are so used, permits such use to be continued, is guilty of a misdemeanor and punishable upon conviction thereof by imprisonment in the county jail for not less than sixty days nor for not more than one year, or by a fine of not less than $100, nor more than $500, or by such imprisonment and fine (Sec. 21-304).

Office Supreme Court, U. S.
APR 26 1926
WM. R. STANSBURY
Clerk

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No. [illegible]

In the Supreme Court of the United States.

OCTOBER TERM, 1925.

HAROLD B. FISKE, *Plaintiff in Error,*
vs.
THE STATE OF KANSAS, *Defendant in Error.*

In Error to the Supreme Court of the State of Kansas.

BRIEF OF DEFENDANT IN ERROR.

CHARLES B. GRIFFITH,
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Assistant Attorney-general of the State of Kansas,
Attorneys for Defendant in Error.

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In the Supreme Court of the United States.

OCTOBER TERM, 1925.

HAROLD B. FISKE, *Plaintiff in Error,*

vs.

THE STATE OF KANSAS, *Defendant in Error.*

No. 305 (30,929).

In Error to the Supreme Court of the State of Kansas.

BRIEF OF DEFENDANT IN ERROR.

STATEMENT.

Plaintiff in error, Harold B. Fiske, in the district court of Rice county, Kansas, was charged by information with and convicted of having violated the Kansas criminal syndicalism statute, chapter 37, Laws of Kansas, 1920, sections 1 to 4 (sections 21-301 to 21-304, Revised Statutes of Kansas, 1923). (Rec. 7, information; Rec. 33, verdict.)

Plaintiff in error, defendant below, appealed from the decision and judgment of the district court of Rice county, Kansas, to the supreme court of the state of Kansas, where the decision of the lower court was affirmed. (Rec. 36, judgment and opinion.)

The opinion of the supreme court of the state of Kansas in this case is reported in volume 117, Kansas Reports, page 69. The case

was entitled: *The State of Kansas, Appellee, v. Harold B. Fiske, Appellant.*

This case comes before this court on a writ of error issued to the supreme court of the state of Kansas. (Rec. 53.)

QUESTION RAISED BY ASSIGNMENT OF ERRORS.

The assignment of errors relied upon by plaintiff in error raises the following question (Rec. 50): Are the provisions of chapter 37, Session Laws of Kansas, 1920 (being sections 21-301, 21-302, 21-303 and 21-304 of the Revised Statutes of Kansas, 1923), in themselves, and more particularly as construed by the Kansas supreme court and as applied to the facts of the case, repugnant to and in contravention of the first clause of the fourteenth amendment to the constitution of the United States.

ARGUMENT.

The Kansas Statute.

Section 3, chapter 37, Laws of Kansas, 1920 (sec. 21-303, R. S. of Kansas, 1923), provides a penalty for the doing of certain things therein set out in the following language:

> "Any person who, by word of mouth, or writing, advocates, affirmatively suggests or teaches the duty, necessity, propriety or expediency of crime, criminal syndicalism, or sabotage, or who shall advocate, affirmatively suggest or teach the duty, necessity, propriety, or expediency of doing any act of violence, the destruction of, or damage to any property, the bodily injury to any person or persons, or the commission of any crime or unlawful act as a means of accomplishing or effecting any industrial or political ends, change or revolution, or for profit; or who prints, publishes, edits, issues or knowingly circulates, sells, distributes, or publicly displays any books, pamphlets, paper, handbill, poster, document, or written or printed matter in any form whatsoever, containing matter advocating, advising, affirmatively suggesting or teaching crime, criminal syndicalism, sabotage, the doing of any act of physical violence, the destruction of or damage to any property, the injury to any person, or the commission of any crime or unlawful act as a means of accomplishing, effecting or bringing about any industrial or political ends or change, or as a means of accomplishing, effecting or bringing about any industrial or political revolution, or for profit, or who shall openly, or at all attempt to justify by word of mouth or writing, the commission or the attempt to commit sabotage, or any act of physical violence, or the destruction of or damage to any property, or the injury of any person or the commission of any crime, or unlawful act, with the intent to exemplify, spread, or teach, or affirmatively suggest criminal syndicalism, or organizes, or helps to organize or become a member of, or voluntarily assembles with any society or assemblage of persons which teaches, advocates, or affirmatively suggests the doctrine of criminal syndicalism, sabotage, or the necessity, propriety or expediency of doing any act of physical violence or the com-

mission of any crime or unlawful act as a means of accomplishing or effecting any industrial or political ends, change or revolution or for profit, is guilty of a felony, and upon conviction thereof, shall be punished by imprisonment in the state penitentiary for a term of not less than one year nor more than ten years, or by a fine of not more than $1,000, or by both such imprisonment and fine."

Section 1, chapter 37, Laws of Kansas, 1920 (sec. 21-301, R. S. of Kansas, 1923), defines criminal syndicalism as follows:

"Criminal syndicalism is hereby defined to be the doctrine which advocates crime, physical violence, arson, destruction of property, sabotage, or other unlawful acts or methods, as a means of accomplishing or effecting industrial or political ends, or as a means of effecting industrial or political revolution, or for profit."

Section 2 of this same act (sec. 21-302, R. S. of Kansas, 1923) defines sabotage as follows:

" 'Sabotage' is hereby defined to be malicious, felonious, intentional or unlawful damage, injury or destruction of real or personal property of any employer, or owner, by his or her employee or employees, or any employer or employers or by any person or persons, at their own instance, or at the instance, request or instigation of such employees, employers, or any other person."

The Statute as Construed by the State Supreme Court Does Not Violate the Constitutional Rights of Plaintiff in Error.

The Information.

The charge against the defendant in the lower court, as contained in the information, reads as follows:

"That on or about the 2d day of July, 1923, and in the county of Rice, and state of Kansas, one Harold B. Fiske, then and there being, did then unlawfully, feloniously, and willfully by word of mouth and by publicly displaying and circulating certain books and pamphlets and written and printed matter, advocate, affirmatively suggest, and teach the duty, necessity, propriety and expediency of crime, and criminal syndicalism

and sabotage, by then and there unlawfully, willfully, knowingly and feloniously persuading and securing Henry Lange, Earl Summers and George Kelley to sign an application for membership in a society known as the Agricultural Workers Industrial Union, No. 110, and by issuing to the said Henry Lange, Earl Summers, and George Kelley, membership cards, commonly known as the red card in said Agricultural Workers Industrial Union, No. 110, which said Agricultural Workers Industrial Union, No. 110, is a branch of and component part of the Industrial Workers of the World organization, said defendant then and there knowing that said organization unlawfully teaches, advocates, and affirmatively suggests: That the working class and the employing class have nothing in common, and that there can be no peace as long as hunger and want are found among millions of the working people, and the few who make up the employing class have all the good things of life. And that, between these two classes a struggle must go on until the workers of the world organize as a class, take possession of the earth and the machinery of production and abolish the wage system. And that, instead of the conservative motto, 'A fair day's wages for a fair day's work,' we must inscribe on our banner the revolutionary watchword, 'Abolition of the wage system.' By organizing industrially we are forming the structure of the new society within the shell of the old." (Rec. 7.)

THE PREAMBLE OF THE I. W. W. CONSTITUTION.

There was introduced as a part of the evidence of the case plaintiff's exhibit 5, which consists of the preamble and constitution of the Industrial Workers of the World. The preamble as contained in this exhibit is as follows:

"The working class and the employing class have nothing in common. There can be no peace so long as hunger and want are found among millions of the working people, and the few who make up the employing class have all the good things of life. Between these two classes a struggle must go on until the workers of the world organize as a class, take possession of the earth and the machinery of production, and abolish the wage system.

"We find that the centering of the management of industries into fewer and fewer hands makes the trade unions unable to cope with the ever growing power of the employing class. The trade unions foster a state of affairs which allows one set of workers to be pitted against another set of workers in the same industry, thereby helping defeat one another in wage wars. Moreover, the trade unions aid the employing class to mislead the workers into the belief that the working class have interests in common with their employers.

"These conditions can be changed and the interest of the working class upheld by an organization formed in such a way that all its members in any one industry, or in all industries, if necessary, cease work whenever a strike or lockout is on in any department thereof, thus making an injury to one an injury to all.

"Instead of the conservative motto, 'A fair day's wage for a fair day's work,' we must inscribe on our banner the revolutionary watchword, 'Abolition of the wage system.'

"It is the historic mission of the working class to do away with capitalism. The army of production must be organized not only for the everyday struggle with capitalists, but also to carry on production when capitalism shall have been overthrown. By organizing industrially we are forming the structure of the new society within the shell of the old." (Trans. 49-50.) (Rec. 14, 15.)

THE COURT'S INSTRUCTIONS TO THE JURY.

The court instructed the jury, among other things, as follows:

"2. To the charge contained in the information the defendant has entered his plea of not guilty, and this plea puts in issue every material allegation alleged in the information, and before the defendant can be lawfully convicted you must be satisfied from the evidence and beyond a reasonoble doubt:

"1st. That the defendant secured the applications of Howard Lang, Earle Summers and George Kelley, and induced any one or either of them to sign an application for membership in a society known as the Agriculture Workers Industrial Union, No. 110.

"2d. That said Agriculture Workers Industrial Union, No.

110, is a branch of and a component part of the Industrial Workers of the World organization.

"3d. That the Industrial Workers of the World organization, commonly called the I. W. W., is an organization that teaches criminal syndicalism as hereinafter defined.

"5. This action is being prosecuted under chapter 37 of the Laws of Kansas for the year 1920, which reads as follows:

" 'SECTION 1. Criminal syndicalism is hereby defined to be the doctrine which advocates crime, physical violence, arson, destruction of property, sabotage, or other unlawful acts or methods, as a means of accomplishing or effecting industrial or political ends, or as a means of effecting industrial or political revolution, or for profit.'

"Section 2 of said chapter defines the crime of sabotage as follows:

" 'SEC. 2. Sabotage is hereby defined to be malicious, felonious, intentional or unlawful damage, injury or destruction of real or personal property of any employer, or owner, by his or her employee or employees, or any employer or employers or by any person or persons, at their own instance, or at the instance, request or instigation of such employees, employers, or any other person.' " (Rec. 27.)

Before the jury could find the defendant guilty under the instructions of the court it must have found as a matter of fact that the defendant induced Howard Lang, Earle Summers and George Kelley to sign an application for membership in a society known as the Agriculture Workers Industrial Union, No. 110; that said society is a branch of and component part of the Industrial Workers of the World organization, and that the Industrial Workers of the World organization is an organization which teaches the doertine which advocates crime, physical violence, arson, destruction of property, sabotage or other unlawful acts or methods as a means of accomplishing or effecting industrial or political ends, or as a means of effecting industrial or political revolution or for profit.

The jury, by its verdict of guilty, found as a matter of fact that the defendant, Harold B. Fiske, did secure applications from said

parties and did induce them to sign applications for membership in a society which advocated and taught the things prohibited by the statute.

The Evidence Shows the Teaching of Doctrine Prohibited by the Statute.

Does the evidence in the case at bar show an advocacy and teaching of the form of crime, violence, arson, destruction of property, sabotage and other unlawful methods designed to effect industrial and political ends which the statute condemns? We think that the language of the preamble is susceptible to such an interpretation as would bring it within the prohibitions of the statute, and that the case was submitted to the jury under proper instructions for its determination as to whether or not the organization known as Industrial Workers of the World did advocate the things prohibited by the statute.

The trial court which heard the evidence approved the verdict of the jury and, by so doing, found that the defendant did the things prohibited by the statute. The verdict of the jury and the rulings, orders and judgment of the trial court were considered and approved by the supreme court of the state of Kansas. That court had before it for its consideration a complete abstract of the evidence. Mr. Justice Mason, who wrote the court's opinion, so well covered the points involved that we quote from the opinion as follows:

> "The information charges the defendant in so many words with having done the things prohibited by the statute, and the question presented is whether the specifications descriptive of the manner in which the acts were done bear out the general terms of the accusation. It does not in set phrase allege that the association known as the Industrial Workers of the World advocates, affirmatively suggests or teaches criminal syndicalism, but when read as a whole it clearly signifies this, and also that the language quoted (which the evidence shows to be taken from the preamble of the constitution of that organization)

was employed to express that doctrine. We regard persuading and inducing others to join an association as one of the methods of advocating, affirmatively suggesting and teaching the doctrines in which it is based. An information has been held insufficient which merely charges the defendant in general terms with having advocated and suggested certain doctrines, the court saying that although words used by way of advocacy, teaching, or suggestion, need not be set out with verbal accuracy, 'the content of the propagation should be fairly indicated.' (*The State v. Breen*, 110 Kan. 817, 205 Pac. 632.) Here the method of propagation is specifically pointed out—the inducing others to become members of an organization devoted to such propaganda. This reasonably advised the defendant of the nature of the charge. It is not necessary that the pleader should go further and set out the arguments that were used to attain the end sought.

"6. The defendant asserts that there was no evidence to support the verdict of guilty. He testified that he had secured the applications of Henry Lang, Earl Summers and George Kelley and issued them membership cards in the I. W. W., saying, however, that this was not done in Rice county—a matter which has already been discussed. He continued:

"'I understand what the Industrial Workers of the World organization teaches. I understand that it teaches, advocates and states that the working class and the employing class have nothing in common and that there can be no peace so long as a few, who make up the employing class, have all of the good things of life. I understand that between these two classes a struggle must go on until the workers of the world organize as a class, take possession of the earth and the machinery of production, and abolish the wage system. I understand that instead of the conservative motto, "A fair day's wages for a fair day's work," we must inscribe on our banner the revolutionary watchword, "Abolition of the wage system." I understand that by organizing industrially we are forming the structure of the new society within the shell of the old. We are organizing with industrial unions to take care of the labor situation in this country and in the world. That means that there won't be any capital, and that means that everybody—that one will be just as well off as the other fellow, at such time as it can be done, and means that everybody will work. That is what it means when it says, "By organizing industrially we are forming the structure of the new society within the shell of the old." The new society will be a new organization—new control—control

of industry. By "in the shell of the old," I mean it will be forward, and instead of breaking up, we will not destroy anything, but we will build them. We will not take over property, but everybody will own property. This will be forced in economically. That is what I was teaching and suggesting when I took these applications. I didn't come right out and say that. The working class will enforce the laws when they are organized sufficiently. The people of the earth will make the laws; we will all belong to the working class. . . . They came to me and asked me if I knew where there was an I. W. W. organizer, and I told them I was one, and they asked me to explain it to them, and I explained it to them. I explained the principles of the organization as far as I knew.'

"The language quoted from the I. W. W. preamble need not, in order to sustain the judgment, be held necessarily and as a matter of law to advocate, teach or even affirmatively suggest physical violence as a means of accomplishing industrial or political ends. It is open to that interpretation and is capable of use to convey that meaning. The construction to be placed upon it in the connection in which it was employed was submitted as an issue of fact by an instruction that no conviction could be had unless from the evidence and beyond a reasonable doubt the jury were satisfied (among other things) that the organization commonly called the I. W. W. is one that teaches criminal syndicalism as definded in the statute. The jury were not required to accept the defendant's testimony as a candid and accurate statement. There was room for them to find, as their verdict show they did, that the equivocal language of the preamble and of the defendant in explaining it to his prospects were employed to convey and did convey the sinister meaning attributed to it by the state." (Rec. 36).

And in this connection the following extract from the opinion of the court in the case of *State v. Moilen*, 140 Minn. 112, 167 N. W. 345; 1 A. L. R. 331, is in point:

"4. We come lastly to the question whether the facts presented by the indictment and certified record show a violation of the statute. There was a trial below, and a verdict of guilty. The evidence is not returned to this court, though the certificate of the trial judge is to the effect that the evidence presented justified a finding of all the facts alleged in the indictment. The charge made by the indictment is that at the time and place

stated therein, defendants did wrongfully and feloniously circulate, distribute, and publicly display certain written and printed matter in the form of posters (photographic copies of which were made a part of the indictment), which were posted upon certain buildings in the village of Biwabik, St. Louis county, and which contained printed matter, advocating and teaching that industrial and political ends should be brought about by crime, sabotage, violence and other unlawful methods of terrorism. We here reproduce the photographic copy of the posters, for without it no clear understanding of their nature can be had.

"In this connection and in further explanation it may be said that the posters are small, 1½ inches to 2 inches in size. The background of the circle in which a snarling black cat appears is bright red in color; the background in the next to the right, in which the large wooden shoe appears, is also a bright red, and so is the flag containing the words, 'Abolition of the Wage system,' and also the poster labeled 'Join the One Big Union.' These were all posted about the village in the nighttime, or, as expressed in the certified record, 'under cover of night,' but there was no evidence offered in explanation of the figures and characters portrayed, except that contained in the posters themselves.

"The question presented is, Does the case so made show an advocacy and teaching of the form of sabotage, or the other methods of terrorism designed to effect industrial and political ends which the statute condemns? We think, and so hold, that the question was one of fact for the jury."

The Preamble of the I. W. W. Constitution Advocates Change by Unlawful Means.

Plaintiff in error argues that there is no language, either in the preamble (Rec. 15) or the testimony of the defendant (Rec. 22, 23) which can be interpreted as an advocacy of the use of force and violence to bring about industrial or political changes. This argument is not based upon the facts. We would call the court's attention to the following language contained in the preamble:

"*There can be no peace* so long as hunger and want are found among millions of the working people, and the few who make

session of the earth and the machinery of production, and all other classes shall be excluded from the enjoyment thereof. Can this program be accomplished by a peaceful, orderly and lawful means? We submit that it cannot be, and we further submit that it is not the purpose of this organization to accomplish its program by lawful means.

The language of the preamble is certainly susceptible to the interpretation given it by the court and jury that it does advocate the doctrines prohibited by the Kansas law. The very terms "peace," "struggle," "organize," and "take possession," when applied to the purposes outlined in this preamble, must be expected to incite in the minds and the hearts of the members of this organization a desire to carry on by any means, including force and violence.

In this connection the court's attention is called to the case of *The United States v. Wallis*, 268 Fed. 413, in which the judge of the district court, S. D., New York, in discussing a manifesto of the Communist Party, which advocates much the same doctrine as is taught by the preamble of the I. W. W. constitution, expresses his views as to the manner in which the Communists are to take possession of governmental and property rights in these words:

> "If those who support the Communist Party in its present declaration of principles hope for success—and I must assume that they have such hope—I cannot do otherwise than conclude that they must contemplate the employment of force and violence. In other words, I am unable to perceive how the expropriation of private property can be accomplished without the employment of forbidden instrumentalities. I say this because of the fact that up to the time of the capture and destruction of the present government its officers will be, as they now are, charged with the protection of property rights, and I cannot imagine that such officers and those whose property the Communists hope to take, will meekly capitulate the moment the Communists demand a transference to them of all such rights. Should such a transfer be demanded and refused,

could it for a moment be supposed that the Communists, if they considered their strength sufficient, would hesitate and seek peaceful means of persuasion? It seems to me that they would unquestionably exert whatever coercion and employ whatever force and violence was necessary to the achievement of their success."

THE DOCTRINE OF THE I. W. W. WAS A MATTER OF GENERAL KNOWLEDGE IN KANSAS PRIOR TO THE ARREST OF THE PLAINTIFF IN ERROR.

Harold Fiske was not the first of the I. W. W.'s to make trouble in Kansas. For several years members of this organization have been coming into the Kansas wheat fields with no other apparent purpose than causing the destruction of property and loss to the farmer. Before Harold Fiske was arrested the activities of the I. W. W. became a matter of general knowledge throughout the wheat-raising sections of the state. Many members of this organization were arrested and some of the cases found their way into the supreme court.

The following extracts from opinions of the Kansas supreme court reflect what was generally known about this organization, its doctrines and its acts:

"The proof offered was mainly statements and admissions made by the petitioner in a conversation with the county attorney and sheriff. He stated in effect to them that he was familiar with the teachings, doctrines and purposes of the Industrial Workers of the World, and believed in and stood for all that the organization advocated. In speaking of his connection with this organization, he stated that he was a member of the I. W. W. and was proud of it; that his duties as a member were to act as a messenger and carry supplies to workers in the field; that for some time he had been working up and down the Missouri Pacific railway, a line running through Rice county; and that just before July 1, 1920, he had come to Frederick, in Rice county, having in his possession some of the books and documents of the organization, where he attempted to deliver them to persons there, but finding that they were already

supplied he did not deliver any of them. He identified books and other literature of the organization which showed the doctrines and practices of the organization. Some of these fall clearly within the condemnation of the statute, . . .

In re William Danton, 108 Kan. 453, 195 Pac. 981.

"The Industrial Workers of the World is a society organized under a constitution and governed by by-laws. Its affairs are directed by a general executive board, chosen at an annual convention, which is the supreme legislative body. This society advocates and teaches criminal syndicalism and sabotage. It grants charters to local societies, called local unions. These unions are required to hold at least one regular meeting each month, and they exist to propagate criminal syndicalism and sabotage."

State vs. Breen, 110 Kan. 817; 205 Pac. 632.

"Large numbers of the defendants had come into the state of Kansas, and had conspired and confederated together to carry out the purposes of the organization, and had conspired and confederated together to stop work in the wheat fields and oil fields of Kansas, by criminal syndicalism and sabotage as defined in the statute.

. . . . . .

"These statistics are given to show why misguided and miscreant members of the Industrial Workers of the World, with a member of the general executive board among them, swarmed into Kansas just before the wheat harvest of 1920. If successful in their efforts, they could paralyze two essential industries, not only of the state, but of the nation, while the country was still suffering from the effects of the disastrous strikes of 1919 and 1920. The action was one to enjoin them from execution of their nefarious design."

State, ex rel., vs. The Industrial Workers of the World (1923), 113 Kan. 347; 214 Pac. 617.

The case at bar was tried in Rice county, Kansas, in the heart of the wheat fields. The case of *In re Danton*, supra, was tried in this county prior to the case at bar. The citizens of Rice county from which the jury was drawn had knowledge of the actual criminal workings of the I. W. W., and any juryman drawn from that

county from his general information would be in a position to interpret the language of the preamble, and we contend that this public knowledge assisted the jury and the trial court in placing upon the language of the preamble a correct interpretation.

In the case of *Schaefer v. United States*, 251 U. S. 466, 472, 473, 64 L. Ed. 360, 363, the trial court instructed the jury—

> "I will withdraw the reference to the 'intent,' but in passing upon the question of the falsity of these publications, in passing upon the question whether we are at war, and in passing upon any other questions which are in like manner a matter of public knowledge and of general information, you have the right to call upon the fund of general information which is in your keeping."

This court approved that instruction.

The Statute as Construed by the State Court Does Not Prohibit the Advocacy of Industrial or Political Change by Lawful Means.

Plaintiff in error in his brief bases his argument upon the proposition that the supreme court of the state of Kansas has interpreted the Kansas law in the case at bar in such a way as to make it a felony for a person to advocate political or industrial change by lawful means. The construction of the law by the state court in this case cannot be so interpreted. The opinion of the Kansas court takes as it premise the fact that the evidence introduced and considered by the jury shows that the defendant was advocating the bringing about of political and industrial change by violence and other unlawful means. The following is again quoted from the court's opinion:

> "The information charges the defendant in so many words with having done the things prohibited by the statute, and the question presented is whether the specifications descriptive of the manner in which the acts were done bear out the general terms of the accusation. It does not in set phrase allege that the association known as the Industrial Workers of the World advocates, affirmatively suggests or teaches criminal syndi-

calism, but when read as a whole it clearly signified this, and also that the language quoted was employed to express that doctrine. (Rec. 39.) The language quoted from the I. W. W. preamble need not—in order to sustain the judgment—be held necessarily and as a matter of law to advocate, teach or even affirmatively suggest physical violence as a means of accomplishing industrial or political ends. It is open to that interpretation and is capable of use to convey that meaning. *The construction to be placed upon it in the connection in which it was employed was submitted as an issue of fact by an instruction that no conviction could be had unless from the evidence and beyond a reasonable doubt the jury were satisfied that the organization commonly called the I. W. W. is one that teaches criminal syndicalism as defined in the statute.*" (Rec. 40.)

This language indicates most clearly that the court interpreting the statute in this case did so having in mind that the defendant had advocated the effecting of political and industrial changes by violence and other unlawful means.

Whether the evidence introduced established the fact that the defendant was guilty of the charge against him was submitted to the jury, and the jury under proper instructions found that the defendant had advocated the effecting of political and industrial change by violence and unlawful means in violation of the statute.

A reading of the complete opinion of the Kansas supreme court will show beyond any doubt that that court in this case construed the statute to provide only for punishment of those who advocate industrial or political change by violence or other unlawful means.

The Kansas Statute Itself Is Not Repugnant to the Constitution.

Plaintiff in error probably will not contend seriously that the Kansas criminal syndicalism law itself is unconstitutional.

This statute has been held to be constitutional by the supreme court of the state of Kansas and similar statutes have been held constitutional by the courts of other states, and by this court.

Benjamin Gitlow v. People of State of New York, 268 U. S. 652, 69 U. S. Sup. Ct. Rep. Law. Ed. 1138.

State v. Fox, 236 U. S. 273; 59 L. Ed. 573; 35 Sup. Ct. Rep. 383.

State of Minnesota v. Moilen, 140 Minn. 112, 167 N. W. 345, 1 A. L. R. 331.

In re McDermott (1919), 180 Cal. 783, 183 Pac. 437.

People v. Malley (1920), 49 Cal. App. 597, 194 Pac. 48.

People v. Stellik (1921), 187 Cal. 361, 203 Pac. 78.

People v. Taylor (1921), 187 Cal. 378, 203 Pac. 85.

State v. Workers Socialist Publishing Co. (1921), 150 Minn. 406, 185 N. W. 931.

State v. Quinlan (1914), 86 N. J. L. 120, 91 Atl. 111.

State v. Boyd, 86 N. J. L. 75, 91 Atl. 586, 87 N. J. L. 328, 93 Atl. 599.

In re Moriarity (1920), 44 Nev. 164, 191 Pac. 360.

State v. Laundy (1922), 103 Ore. 443, 204 Pac. 958.

State v. Hennessy (1921), 114 Wash. 351, 195 Pac. 211.

State v. Hestings (1921), 115 Wash. 19, 196 Pac. 13.

State v. Hemhelter (1921), 115 Wash. 208, 196 Pac. 581.

The legislature of the state of Kansas has attempted to prevent the accomplishing or effecting of industrial or political ends or industrial or political revolution by the exercise of crime, physical violence, arson, destruction of property, sabotage and other unlawful actions or methods. In order to do this the legislature has made it a felony, *inter alia*, for anyone to accomplish or effect industrial or political ends or industrial or political revolution in the following ways:

1st. By advocating, either by word of mouth or writing, the duty, necessity, propriety or expediency of criminal and unlawful methods to effect such ends.

2d. By printing, publishing, editing, issuing, circulating, distributing or publicly displaying any book or written or printed matter in any form which advocates, advises, suggests or teaches criminal and unlawful action as a means of effecting such ends.

The New York statute (New York Penal Laws, Sec. 160, 161), hereinafter referred to and quoted, is directed against the doctrine

and welfare'; and that its police 'statutes may only be declared unconstitutional where they are arbitrary or unreasonable attempts to exercise authority vested in the state in the public interest.' . . . That utterances inciting to the overthrow of organized government by unlawful means present a sufficient danger of substantive evil to bring their punishment within the range of legislative discretion is clear. Such utterances, by their very nature, involve danger to the public peace and to the security of the state. They threaten breaches of the peace and ultimate revolution. And the immediate danger is none the less real and substantial because the effect of a given utterance cannot be accurately foreseen. . . . The state cannot reasonably be required to measure the danger from every such utterance in the nice balance of a jeweler's scale. A single revolutionary spark may kindle a fire that, smoldering for a time, may burst into a sweeping and destructive conflagration. It cannot be said that the state is acting arbitrarily or unreasonably when, in the exercise of its judgment as to the measures necessary to protect the public peace and safety, it seeks to extinguish the spark without waiting until it has enkindled the flame or blazed into the conflagration. It cannot reasonably be required to defer the adoption of measures for its own peace and safety until the revolutionary utterances lead to actual disturbances of the public peace or imminent and immediate danger of its own destruction; but it may, in the exercise of its judgment, suppress the threatened danger in its incipiency.

"We cannot hold that the present statute is an arbitrary or unreasonable exercise of the police power of the state, unwarrantably infringing the freedom of speech or press; and we must and do sustain its constitutionality.

"This being so it may be applied to every utterance—not too trivial to be beneath the notice of the law—which is of such a character and used with such intent and purpose as to bring it within the prohibition of the statute. . . .

"In other words, when the legislative body has determined generally, in the constitutional exercise of its discretion, that utterances of a certain kind involve such danger of substantive evil that they may be punished, the question whether any specific utterance coming within the prohibited class is likely, in and of itself, to bring about the substantive evil, is not open to

consideration. It is sufficient that the statute itself be constitutional, and that the use of the language comes within its prohibition."

Using the language of the Gitlow case defendant in error contends: That a state in the exercise of its police power may punish those who abuse this freedom of speech by utterances inimical to the public welfare tending to incite to crime, to destroy property or disturb the peace is not open to question. By enacting the present statute the state of Kansas has determined through its legislative body that utterances advocating the propriety of crime, physical violence, arson, destruction of property, bodily injury to any person or persons or the commission of any unlawful act for the purpose of effecting industrial or political ends, change or revolution are so inimical to the general welfare and involve such danger of substantive evil that they may be penalized in the exercise of its police power. That determination must be given great weight. Every presumption is to be indulged in favor of the validity of the statute and the case is to be considered in the light of the principle that the state is primarily the judge of the regulations required in the interest of public safety and welfare; that utterances inciting to the accomplishment or effecting of industrial or political ends, change or revolution by unlawful means, present a sufficient danger of substantive evil to bring their punishment within the range of legislative discretion is clear. Such utterances by their very nature involve danger to the public peace and to the security of the state, threaten breaches of the peace and revolution.

The decisions in the Gitlow case and other cases cited when applied to the case at bar point to but one conclusion:

The Kansas statute is not violative of the constitution of the United States.

CONCLUSION.

It naturally follows, that if the Kansas criminal syndicalism law is constitutional, that if the organization known as the Industrial Workers of the World teaches and advocates industrial and political changes by violence or other unlawful means, then that the defendant, in teaching and advocating the principles of such organization, was violating the Kansas criminal syndicalism statute. Such being the case, his arrest and prosecution did not deprive him of any rights guaranteed to him by the fourteenth amendment to the constitution of the United States.

It is the contention of the state that the arrest, trial and conviction of the defendant is well within the police power inherent in the state.

Respectfully submitted,

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